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IN THE

Supreme Court of the United States

BOBBY L. HUGHLEY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

When a defendant charged with a specific intent offense seeks to admit evidence that he was under the intoxicating influence of cocaine and was admitted to an in-patient cocaine rehabilitation clinic on the same day he made one of the two statements for which he was convicted, should a district court refuse to admit that evidence?

II.

When a defendant seeks to exclude prejudicial evidence in a prosecution for making a false statement regarding work activities on an application for federal benefits, should a district court deny that request when the evidence relates to purported work-related activities outside the time frame of the indictment?

III.

When the United States Sentencing Guidelines require the calculation of the amount of loss proper for sentencing be based on actual loss to the government, should a district court calculate the amount of loss based on the total amount of benefits received, rather than the amount wrongly received?

IV.

When a two-point Sentencing Guidelines enhancement for more than minimal planning is routinely applied only in cases involving complex criminal activity, should a district court apply the enhancement for an exceptionally simple crime?

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IN THE

SUPREME COURT OF THE UNITED STATES

BOBBY L. HUGHLEY,

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Bobby L. Hughley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on June 2, 2000.

CITATION TO OPINION BELOW

The decision of the United States District Court for the Southern District of New York (Keenan, D.J.) is not reported. The opinion of the Second Circuit is reported as *United States* v. *Hughley*, No. 99-1550, 2000 U.S. App. LEXIS 12472 (2d Cir. June 2, 2000), and is reprinted in the attached Appendix. (A.1.)[1]

STATEMENT OF JURISDICTION

The Petitioner, Bobby L. Hughley, was found guilty of two counts of making false statements in connection with the receipt of disability benefits under the Federal Employees Compensation Act, in violation of Title 18 U.S.C. § 1920, on March 22, 1999. On September 9, 1999 the District Court for the Southern District of New York sentenced Hughley to a term of twelve months and one day of imprisonment and ordered Hughley to pay restitution of $68,354.76 to the Department of Labor.

On September 15, 1999, the Defendant timely filed a Notice of Appeal of his judgement of conviction and sentence of imprisonment with the Second Circuit Court of Appeals. On June 2, 2000, the Second Circuit entered its decision and opinion affirming the judgment and the sentence of the district court. Hughley's petition for a writ of certiorari is timely filed.

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[1] "A." refers to the attached Appendix.

STATUTORY PROVISIONS AND RULES

Title 18 § 1920 states in relevant part:

"Whoever knowingly and willfully falsifies, conceals, or covers up a material fact, or makes a false, fictitious, or fraudulent statement or representation, or makes or uses a false statement or report knowing the same to contain any false, fictitious, or fraudulent statement or entry in connection with the application for or receipt of compensation or other benefit or payment under subchapter I or III of chapter 81 of title 5, shall be guilty of perjury, and on conviction thereof shall be punished by a fine under this title, or by imprisonment for not more than 5 years, or both."

Title 5 § 8106 states in relevant part:
"An employee who knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required."

U.S. Sentencing Guidelines Manual § 2F1.1, Application Note 8, states in relevant part:

"In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses."

U.S. Sentencing Guidelines Manual § 1B1.1, Application Note 1(f), states in relevant part:

"'More than minimal planning' means more planning than is typical for commission of the offense in a simple form. 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense. 'More than

minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune."

Federal Rule of Evidence 401 states:

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Federal Rule of Evidence 403 states:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

STATEMENT OF THE CASE

This petition presents questions of substantial importance regarding evidence admissible at trial and sentencing calculations. The decision of the Second Circuit, if left undisturbed, has the potential to impact numerous defendants facing trial and sentencing.

The petitioner was denied the opportunity to introduce evidence of his intoxication on the very day that he made one of the false statements for which he was convicted. As the petitioner was convicted of a specific intent crime, evidence of a diminished capacity was crucial to his defense. Had the jury been given the opportunity to properly weigh and evaluate such documentary evidence and live witness testimony it may have found him not

guilty on one count of the indictment. This would have significantly reduced the amount of time the petitioner was to be incarcerated. Evaluation of evidence is specifically within the province of a jury and is fundamental to its core function. *See United States* v. *Goldstein*, 695 F.2d 1228, 1234-35 (10th Cir. 1981) (stating that where intent is an element of the crime charged, the issue is particularly one for the jury). Juries are free to reject evidence they find unpersuasive and it is not essential to have the assistance of an expert witness, or the defendant himself, in order to perform this function.

The petitioner was also unable to prevent the jury from learning of his purported work-related activities that occurred outside the time frame of the indictment. This evidence did not tend to make the existence of any fact that was of consequence to the outcome of the action more probable than not. Moreover, the evidence unfairly prejudiced the jury and invited it to draw an impermissible inference that such evidence was proof of the fact that the defendant was working during the time frame relevant to the indictment.

This Court should grant certiorari because the Second Circuit's decision regarding the application of the Federal Rules of Evidence has the potential to prevent all defendants standing accused of committing specific intent crimes from presenting evidence that would negate the state of mind required to commit the offense. In addition, permitting evidence that is irrelevant and unfairly prejudicial will have an adverse affect on thousands of criminal trials and will make it significantly more difficult for an accused to defend himself.

The Second Circuit also rejected petitioner's challenge to the district court's interpretation of the federal sentencing guidelines. Petitioner first argued that amount of loss should be based on the amount of benefits wrongly received rather than the total amount received. Second, petitioner argued that the two-point enhancement for more than minimal planning was inappropriate in the instant case.

This Court should grant certiorari because the decision of the Second Circuit conflicts with the decision of the Fourth Circuit requiring amount of loss be based on the difference between the amounts actually received and the amount that would have been received if employment activity were truthfully reported. Because many courts will have to consider the same issue, this Court should resolve the conflict. This Court should also resolve the important question of the level of planning that is necessary for a two-point enhancement to be applied to a sentence.

1. Factual Background

In 1979, while he was employed by the United States Postal Service, Hughley suffered a herniated disc as a result of a work-related automobile accident. Hughley became unable to work and began collecting disability benefits through the United States Department of Labor Office of Workers Compensation Programs ("OWCP"). Since 1979, Hughley has filed numerous CA-1032 forms providing information about his work activities and income. (A. 18.) In February 1988 and in October 1993 Hughley submitted two CA-1032 forms in which he reported that he had been self-employed

at various times during the previous 15 months. (A. 24-28.)

In October 1995, Hughley submitted a CA-1032 form in which he responded "no" to questions whether he had been self-employed or worked for any employer during the previous fifteen months. (A. 29-30.) Hughley responded "yes" to the question whether he was "unemployed for all periods during the past 15 months." (A. 20-21.) In January 1997, Hughley submitted an inadvertently misdated CA-1032 form with the same responses as the October 23, 1995 form. In response to a request from OWCP, Hughley re-submitted the same CA-1032 form. (A. 22-24.)

The government's evidence relating to the allegation that Hughley was engaged in work-related activities between June 1994 and March 1997 showed that Hughley purchased commercial motor vehicle insurance for two trucks in July 1994 and in June 1995. Both policies were canceled for non-payment of premiums within two months of issuance. (A. 44-46.) The government also offered evidence that in 1996 and 1997, Hughley renewed previously obtained consumer business loans from a bank in Georgia and in 1995 and 1996 Hughley renewed a prior consumer truck purchase loan from the same bank. (A. 56-58.)

The government offered evidence that Hughley applied in July 1994, May 1995 and November 1996 to the Connecticut Department of Health for permits to operate a food service establishment identified as Georgia Pride Meats and Produce in New Haven, Connecticut. Government witnesses testified that between 1994 and 1997, Hughley was seen on occasion selling produce from a portable

table or a trailer on a vacant lot in New Haven. The government submitted evidence that Hughley applied for a Connecticut tax registration number to sell fruits and produce on July 8, 1994 and that he reported to the Connecticut Department of Revenue quarterly gross receipts of $3500 in September 1994, $4500 in December 1994, $3000 in March 1995 and $2800 in June 1995.

2. The Proceedings Below

After a two day jury trial, Hughley was convicted and sentenced for two counts of violating 18 U.S.C. § 1920 by making false statements in order to obtain federal disability benefits. On September 9, 1999, the district court sentenced Hughley to a term of imprisonment for one year and one day. The district court also ordered Hughley to pay restitution in the amount of $68,354.76. Hughley is currently serving his sentence. The district court had jurisdiction in the first instance in this case because the alleged crimes were violations of federal law and the defendant was sentenced pursuant to the federal sentencing guidelines.

The judgment and sentence was appealed to the Second Circuit Court of Appeals. First, Hughley challenged the district court's exclusion of documentary evidence and testimony regarding his intoxication on March 12, 1997, the day Hughley made one of the two statements for which he was convicted. The excluded documentary evidence consisted of a cocaine urinalysis test upon admission to an in-patient cocaine detoxification program at Veteran's Hospital showing the presence of cocaine. The court also excluded the testimony of the nurse who admitted Hughley to the hospital,

that based on her experience as a certified substance abuse nurse, his behavior upon admission was consistent with cocaine intoxication. The district court ruled the testimony of the nurse inadmissible, finding that there was not sufficient evidence that Hughley could not have formed an intent to defraud on March 12, 1997, and that her testimony would be subject to speculation.

Second, Hughley challenged the admission of evidence of his work activities outside of the time period covered by the indictment, such as bank loan activities, purportedly work-related meetings Hughley attended and a permit to sell produce from the New Haven Department of Health. The district court ruled that the evidence was relevant and admissible.

Hughley also challenged two aspects of his sentence. First, Hughley challenged the calculation of the amount of loss based on the entire amount of disability benefits he received during the indictment period. Second, Hughley challenged the district court's imposition of a two-level enhancement for more than minimal planning based on false statements made on at least three occasions.

The Second Circuit Court of Appeals affirmed the decision of the district court in all respects.

REASONS FOR GRANTING THE WRIT

I. Defendants Should Be Permitted to Introduce Evidence of Intoxication When Charged With Specific Intent Crimes

The trial court committed reversible error by excluding two crucial pieces of evidence of Hughley's intoxication: the testimony of Cynthia

Smith, a nurse who admitted Hughley to a cocaine detoxification center on the day of his alleged false statement (A. 67-74.), and a urinalysis test, taken by Hughley on the same day and showing the presence of cocaine. (A. 66.) Because of the centrality of this evidence to Hughley's defense, exclusion constituted reversible error. Conceding that the evidence was relevant, the Second Circuit affirmed the district court nonetheless. *Hughley*, 2000 U.S. App. LEXIS 12472 at *3.

The excluded evidence was relevant under Rule 401 of the Federal Rules of Evidence which states that "relevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "An incremental effect on the probability of a jury finding" on the fact in question is sufficient to establish relevancy. *Doe* v. *New York City Dep't of Soc. Servs.*, 649 F.2d 134, 147 (2d Cir. 1981). *See also United States* v. *Abel*, 469 U.S. 45, 51 (1984). Under Rule 401, "the basic standard of relevance is a liberal one." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) (citing *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993)).

The evidence excluded at trial was not only relevant, but crucial to disproving the government's assertion of specific intent. Commission of a fraud against the government in violation of the general federal anti-fraud statute, 18 U.S.C. § 1001, is a specific intent crime. *See United States* v. *Yermian*, 468 U.S. 63, 64 (1984). Likewise, the specific anti-fraud statute at issue here, 18 U.S.C. § 1920, also requires proof of specific intent to defraud. *See*

United States v. *Gilliam*, 1996 WL 601399, *6 (S.D.N.Y. 1996). Because § 1920 is recognized as the offspring of § 1001, courts have construed § 1920 as containing the same basic elements as § 1001. *See United States* v. *Henry*, 164 F.3d 1304, 1308 n.2 (10th Cir.), *cert. denied*, 527 U.S. 1029 (1999); *United States* v. *Fitzgerald*, 147 F.3d 1101, 1103 n.1 (9th Cir. 1998). The textual requirements of the two statutes regarding intent are identical; both demand proof that the defendant acted "knowingly and willfully." *Compare* 18 U.S.C. § 1001(a) *and id.* § 1920.

As a specific intent crime, intentional conduct under § 1920 is subject to a defense of voluntary intoxication. It is well-settled that evidence of voluntary intoxication may be used to negate the intent element of specific intent crimes. *See United States* v. *Rahman*, 189 F.3d 88, 142 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 830 (2000) (approving jury instructions that allow intoxication to "negate the existence of the defendant's intent to commit the crime"); *United States* v. *Davis*, 183 F.3d 231, 253, *amended by*, 197 F.3d 662 (3rd Cir. 1999) ("[I]ntoxication can negate specific intent . . . .").

The excluded evidence is relevant under Rule 401 because it directly supports Hughley's voluntary intoxication defense. The testimony of Cynthia Smith and the urinalysis test results provided Hughley with one of the building blocks necessary for the construction of his defense to the government's evidence of specific intent. The excluded evidence significantly bolsters Hughley's specific intent defense and makes "more probable" the fact that Hughley was intoxicated when he executed the CA-1032 form that same day than that

fact would have been without the test. This increased probability strengthens the likelihood of Hughley's incapacitation and inability to form specific intent when he filled out and submitted the CA-1032 form.

Trial courts are empowered by Rule 403 of the Federal Rules of Evidence to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. However, numerous courts have warned that exclusion of probative evidence under Rule 403 "is an extraordinary remedy that must be used sparingly." *Koch* v. *Koch Indus.*, 203 F.3d 1202, 1229 (10th Cir. 2000) (*petition for cert. filed*); *Westcott* v. *Crinklaw*, 68 F.3d 1073, 1077 (8th Cir. 1995); *George* v. *Celotex Corp.*, 914 F.2d 26, 31 (2d Cir. 1990); *Dartez* v. *Fibreboard Corp.*, 765 F.2d 456, 461 (5th Cir. 1985); *United States* v. *Jamil*, 707 F.2d 638, 642 (2d Cir. 1983); *United States* v. *King*, 713 F.2d 627, 631 (11th Cir. 1983); *United States* v. *Thevis*, 665 F.2d 616, 633 (5th Cir. 1982).

Evidence is properly excluded because of the potential for "misleading the jury" or "confusion of the issues" when the proffer concerns matters that are tangential to the primary legal issues in the case. *See Old Chief* v. *United States*, 519 U.S. 172 (1997); *see also United States* v. *Malpeso*, 115 F.3d 155, 163 (2d Cir. 1997); *United States* v. *Dakins*, 872 F.2d 1061, 1063 (D.C. Cir. 1989) (excluding evidence under the "misleading" and "confusion" bases of Rule 403 because of its tangential nature); 2 *Jack B. Weinstein & Margaret A. Berger,*

Weinstein's Federal Evidence, § 403.05[1] (2d ed. 1997) (explaining that these two bases are used to exclude evidence that courts fear "would distract the jury from the important issues").

Failing to recognize or acknowledge the importance of this evidence to Hughley's defense, the Second Circuit determined that exclusion of this relevant evidence would not have so substantially influenced the jury as to change the outcome of the trial. *Hughley*, 2000 U.S. App. LEXIS at *4. This decision is groundless. The evidence offered by Hughley was hardly of secondary importance. Rather, it went to the heart of his defense: Hughley's mental state and ability to form specific intent at the time of the alleged fraud. The importance of evidence to a criminal defendant's defense strategy should factor heavily in a trial court's Rule 403 analysis: "'given the importance of the . . . testimony to the defense, whatever confusion . . . that may have resulted from its admission would have to have been overwhelming to satisfy Rule 403's balancing test.'" *United States* v. *Blum*, 62 F.3d 63, 68 (2d Cir. 1995) (citing *United States* v. *Harvey*, 547 F.2d 720, 723 (2d Cir. 1976)).

The trial court also failed to consider Hughley's alternatives for establishing his defense. When analyzing an item of evidence under Rule 403, a court must consider the evidence in the context of all of the evidence supporting the particular fact. *See Old Chief*, 519 U.S. at 184-85. An important factor in this contextual analysis is the "'availability of other means of proof.'" *Id.* (citing *Advisory Committee's Notes on Fed. R. Evid.* 403, 28 U.S.C. App., p. 860). In *Old Chief*, the defendant was charged with violating a federal statute that

prohibits possession of a firearm by anyone who has been convicted of a felony. This Court held that the trial court erred in allowing the government to prove the defendant's earlier felony conviction by judgment of conviction, since the defendant had offered to stipulate to his earlier conviction. Since the stipulation was alternative evidence of the felony element, Rule 403 barred the introduction of the more prejudicial judgment of conviction. In the case at hand, however, there is no indication in the record that the trial court considered the unavailability of other evidence proving intoxication before it barred Hughley's strongest evidence.

Exclusion of Hughley's evidence under Rule 403 was an error because the trial court's application of the rule was arbitrary. Most significantly, the trial court failed "to make a 'conscientious assessment' of whether unfair prejudice substantially outweighs probative value." *United States* v. *Salameh*, 152 F.3d 88, 110 (2d Cir. 1998) (citing *United States* v. *Birney*, 686 F.2d 102, 106 (2d Cir. 1982)). *See also McQueeney* v. *Wilmington Trust Co.*, 779 F.2d 916, 923 (3d Cir. 1985) (remand required where trial court "did not articulate its reasons for its finding of prejudice"). The court's analysis of the issue appearing in the record, discussed above, did not include a finding that prejudice "substantially" outweighed probative value. Because the proffered evidence was probative of the defendant's state of mind on the day of the alleged fraud, and because the evidence could only have assisted the jury in its assessment of that central issue, exclusion of Hughley's evidence constituted an abuse of discretion.

Finally, the evidence was so critical to Hughley's

defense that his Sixth Amendment rights were compromised. The Seventh Circuit has warned of the potential Constitutional ramifications of excluding a defendant's only evidence of voluntary intoxication. In *United States* v. *Hillsberg*, 812 F.2d 328 (7th Cir. 1987), the trial court did not permit a criminal defendant charged with murder to introduce expert testimony regarding the defendant's intoxication during the murder. *See id.* at 331. The Seventh Circuit affirmed the trial court's ruling because the expert's testimony improperly addressed the ultimate legal issue. *See id.* at 332. The defendant was also able to admit other evidence of his intoxication. *See id.* at 333. However, the court warned that "[t]he Sixth Amendment might come into play if Hillsberg was foreclosed from presenting evidence of his intoxication, because it was central to his argument that he did not act with the requisite intent." *Id.* Similarly, the trial court here excluded Hughley's only evidence of intoxication, despite its relevance, thereby foreclosing Hughley's ability to rebut the specific intent element of the charge.

II. Defendants Should Be Permitted to Exclude Prejudicial Evidence of Activities that Take Place Outside the Time Frame of the Indictment

The indictment alleged that, on October 23, 1995 and March 12, 1997, the defendant made false statements regarding his employment activities during the previous fifteen months. The district court erred in admitting various items of evidence relating to Hughley's purported employment-related activities *after* March 1997. The district court

admitted testimonial and documentary evidence of Hughley's bank loan activities on June 25, 1997, more than three months after the end of the period covered by the indictment. (A. 55-56.) In addition, the court admitted government witness testimony regarding purportedly work-related meetings Hughley attended in "April or May" of 1997, (A. 60-62.), and in June 1997. (A. 43.) Finally, the court admitted testimonial and documentary evidence that Hughley obtained a permit to sell produce from the New Haven Department of Health on November 14, 1997.

Such evidence should have been excluded pursuant to Federal Rules of Evidence 401 and 403. This evidence unfairly prejudiced the jury, and is irrelevant to the conduct that occurred between October 1995 and March 1997, the time period at issue. Evidence must be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. *Perry* v. *Ethan Allen, Inc.*, 115 F.3d 143, 151 (2d. Cir. 1997).

Introduction of this evidence was unfair because it invited the jury to infer that such evidence is proof that the defendant was engaged in work activities during the time relevant to the indictment. In affirming the district court, the Second Circuit found that this evidence "strongly suggest[ed]" that Hughley's business was in operation during the period at issue. Hughley, 2000 U.S. App. LEXIS at *5. Such a finding was error. The inference is illogical and unsupported. *See United States* v. *Ellzey*, 936 F.2d 492, 497 (10th Cir. 1991) (evidence properly excluded under Rule 403 due to the "remote and tenuous link" between the evidence and the charged crime). Therefore, this Court

should grant a writ of certiorari to reverse the decision of the Second Circuit and order a new trial.

III. Amount of Loss for Sentencing Purposes Should Be Based on the Amount of Benefits Wrongly Obtained

In the case below, the district court determined, as a matter of law, that the amount of loss for sentencing purposes should be calculated based on the entire amount of benefits received, rather than the amount wrongly received. Reviewing this determination *de novo*, the Second Circuit summarily affirmed the decision of the district court. *Hughley*, 2000 U.S. App. LEXIS at *6. Among the circuit courts that have addressed this issue, there is a difference of opinion. *See, e.g., United States* v. *Dawkins*, 202 F.3d 711 (4th Cir. 2000), *cert. denied*, 120 S. Ct. 1989 (2000); *Henry*, 164 F.3d. at 1310. The Fourth Circuit recently ruled in a manner inapposite to the Second Circuit when it decided that the purposes of the Guidelines are best served by calculating the amount of loss based only on amounts wrongly received. *Dawkins*, 202 F.3d. at 714-15. Because this important issue has not been directly addressed by this Court it is imperative that it be reviewed now as it potentially affects every federal employee and recipient of federal workers compensation benefits.

Section 2F1.1 of the Guidelines, which governs the fraud offense of which Hughley was convicted, provides for adjustment of the offense level according to the "amount of loss." U.S. Sentencing Guidelines Manual § 2F1.1(b)(1) (1999). Loss is defined in Application Note 8 as "the value of the money, property, or services unlawfully taken." *Id.*

§ 2F1.1 Comment 8. Loss is not typically defined by the gross amount involved in the fraudulent scheme.[2] *See United States* v. *Parsons*, 109 F.3d 1002, 1004 (4th. Cir. 1997); *United States* v. *Mount*, 966 F.2d 262, 265 (7th Cir. 1992). By definition, common understanding, and logic, the amount "unlawfully taken" here is the amount of disability benefits obtained over and above the amount to which the recipient would have been entitled had he or she not understated his income.

In addition, Application Note 8(d) specifically provides that in a case involving diversion of Government benefits, "loss is the value of the benefits diverted from intended recipients or uses." U.S. Sentencing Guidelines Manual § 2F1.1 comment 8(d). This Application Note compels the conclusion that the amount of loss under the circumstances here is limited to the amount of benefits wrongfully obtained, as that is the only amount that was diverted from its intended recipients. *See Stinson v. United States*, 508 U.S. 36, 47 (1993) (Guidelines commentary interpreting or explaining a guideline is authoritative). The remainder of the benefits Hughley received -- that is, the amount to which Hughley would have been entitled even if he had fully reported his income -- cannot be said to have been diverted from its intended recipient.

The overarching rationale articulated by the

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[2] For example, according to Application Note 8(a), where "a defendant fraudulently represents that stock is worth $40,000 and the stock is worth only $10,000, the loss is the amount by which the stock was overvalued (*i.e.*, $30,000)." U.S Sentencing Guidelines Manual § 2F1.1 comment 8(a).

Second Circuit, in affirming the district court, was the conclusion that Hughley's benefit payments would have likely ceased altogether. *Hughley*, 2000 U.S. App. LEXIS at *6. The record provides no support for this assertion. Trial testimony showed that had Hughley reported his work-related activity, his benefits would not have been terminated, but simply reduced according to his capacity for work or his earning potential. (A. 17-19.) At best, the record shows that Hughley sporadically engaged in work-related activities during the time period in question. Most of the evidence of Hughley's work-related activities at trial related to non-physical activities such as applications for loans, vehicle insurance, permits and a tax registration number. (A. 37-39, 64.) The evidence that Hughley was actually engaged in truck driving or produce sales was limited to a handful of occasions (A. 41, 59, 62.) and falls far short of supporting a finding that Hughley was consistently or even regularly capable of and actually engaged in such activity between 1994 and 1998, such that he would have been entitled to no disability benefits whatsoever had he truthfully reported his activities. Therefore, the court's failure to offset the amount of loss attributable to Hughley's offense by the amount of benefits to which Hughley was legally entitled was error.

A. The Decision of the Second Circuit Directly Conflicts with the Fourth Circuit

In *United States* v. *Parsons*, the Fourth Circuit held that where a postal service employee was convicted of filing false claims for submission of partially fraudulent travel vouchers, the appropriate

calculation of the "amount of loss" under Section 2F1.1 was the amount of funds fraudulently obtained in excess of the amount to which she was lawfully entitled. 109 F.3d at 1005-1006. The court reasoned that "[l]oss is not the total amount of the benefits the defendant received, because some benefits may be rightfully due; instead loss is measured by the amount diverted from proper purposes." *Id.* at 1004. The court, citing holdings of four other Courts of Appeals, noted that, "in sentencing violators of [the false claims statute at issue], courts have unanimously focused upon the actual loss caused and not the entire amount involved." *Id.* at 1005 (citing *United States* v. *Leahy*, 82 F.3d 624, 638 (5th Cir. 1996); *United States* v. *Abud-Sanchez*, 973 F.2d 835, 837-40 (10th Cir. 1992); *United States* v. *Rayborn*, 957 F.2d 841, 842-44 (11th Cir. 1992); *United States* v. *Haddon*, 927 F.2d 942, 951 (7th Cir. 1991)). *See also United States* v. *Arnous*, 122 F.3d 321, 324 (6th Cir. 1997) (where convenience store owner filed false claims to Department of Agriculture for food stamp reimbursement, proper calculation of loss is amount fraudulently diverted from eligible recipients offset by the cost of the inventory to the other stores and the face amount of the food stamps). *But see Henry*, 164 F.3d at 1310 (holding proper calculation of loss is total amount of benefits received).

The *Parsons* and *Arnous* holdings recognize that the Sentencing Guidelines are intended to provide customized sentences through the use of "specific offense characteristics" such as adjustment for "amount of loss," thereby creating a "modified real offense" system which focuses at least as much on the particular offense behavior as the offense of

conviction. *See* U.S. Sentencing Guidelines Manual Ch. 1, Pt. A, intro. comment at 5-6 (1999); Frank O. Bowman, III, *Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 Vand. L. Rev. 461, 475 (1998).

In February of this year, the Fourth Circuit again addressed the issue of "amount of loss". In *United States* v. *Dawkins*, the court faced the precise issue that the petitioner now asks this Court to address — the proper "amount of loss" calculation in the context of a sentencing for a violation of 18 U.S.C. § 1920. Following its reasoning in *Parsons* the court held that the amount of fraud loss attributable to the defendant was properly calculated as the difference between the amount of benefits actually received and the amount he would have received had he truthfully and accurately completed his forms. 202 F.3d. at 714-15. Here, as in *Dawkins*, culpability should be reflected only by the amount fraudulently taken, not the total amount of benefits received.

Declining to follow the Fourth Circuit, the district court in Hughley based its "amount of loss" calculation in large part on *Henry*. In affirming the district court, the Second Circuit necessarily relied on *Henry* as well. The reasoning of *Henry* was flawed due to its reliance on *United States* v. *Brothers*, 955 F.2d 493 (7th Cir. 1992). *Brothers* examined "amount of loss" for restitution purposes, not under the Sentencing Guidelines. As recognized by the Second Circuit, the restitution inquiry is generally different from the sentencing inquiry. *See United States* v. *Germosen*, 139 F.3d 120, 130 (2d Cir. 1998), *cert. denied*, 525 U.S. 1083 (1999).

As Judge Henry explained in his detailed and well-reasoned dissent in *Henry*, "because the purpose of using 'loss' as a factor in sentencing is as a gauge of the severity of the crime, using the entire amount of benefits received as a measure of the loss and thus as a measure of the severity of the crime makes little sense." 164 F.3d at 1312 (Henry, J., dissenting) (internal citation omitted). In his dissent, Judge Henry aptly demonstrated the inequitable and arbitrary results that flow from calculation of loss as the entire amount of benefits received, without offsetting the amount rightfully received:

> The absurdity of this calculus is best suggested by hypothetical. Consider two defendants. The first lied on her 1032 form in a manner that caused her to receive ten dollars more than she would have received but for the lie. Yet her total benefits during the period covered by that 1032 are $80,000. The second defendant lied on his 1032 form in a manner that caused him to receive $10,000 more than he would have received but for the lie, and yet his total benefits in that period amount to $11,000. I cannot imagine a rational basis for punishing the first defendant, perpetrator of a ten dollar lie, more severely than the second, whose lie is one thousand times more costly to the government.

Id. at 1312. The framers of the Guidelines did not intend such arbitrary results to flow from application of Section 2F1.1.

The calculation of the amount of loss for

Hughley cannot be reconciled with the Guidelines' purpose and intent to vary the severity of a sentence according to the severity of the offense. This calculation provides for no distinction among offenders based on the magnitude and culpability of their unlawful conduct as the Guidelines intended. This Court should grant a writ of certiorari to reverse the Hughley decision and remand for re-sentencing.

B. Amount of Loss Calculations for the Purposes of Sentencing Should Not be Tied to the Federal Civil Forfeiture Statute, Title 5 § 8106 (b)

In addition to drawing the unfounded conclusion that the petitioner would have received no benefits had he told the truth, the Second Circuit based its decision on the language of 5 U.S.C. § 8106. This reasoning is untenable. Section 8106, the civil statute governing federal disability benefits, provides for forfeiture of the entire amount of benefits received during the indictment period. Section 8106 provides, in pertinent part: that "[a]n employee who . . . knowingly omits or understates any part of his earnings forfeits his right to compensation with respect to any period for which the affidavit or report was required." § 8106 (b) (2) (2000). Citing this civil forfeiture statute, the Second Circuit stated that "5 U.S.C. § 8106(b)(2) unambiguously requires the forfeiture of all benefits Hughley collected during the period that he omitted or understated any part of his earnings". *Hughley*, 2000 U.S. App. LEXIS 12472 at *5. This is irreconcilable with Section 2F1.1 of the Guidelines, which requires that the amount of loss reflect

culpability. Culpability is unrelated to the amount a defendant may have to civilly forfeit.

Section 8106 is not relevant to the calculation of the loss and does not provide a basis for calculating the amount of loss for sentencing purposes as the entire amount of benefits received during the indictment period. Courts have repeatedly rejected reliance on similar civil forfeiture language to support loss calculations based on total benefits received. In *Parsons*, for example, the Fourth Circuit rejected the district court's calculation of loss for sentencing purposes based on the relevant civil forfeiture provision, holding that "[f]orfeiture is a penalty imposed on a criminal independent of any loss to the crime victim. The procedures for forfeiture are set forth in a comprehensive statutory framework of their own, one which is separate and apart from the Sentencing Guidelines." 109 F.3d at 1005-1006 (internal citations omitted). As the *Parsons* court noted, the Fourth Circuit has "never utilized" the forfeiture statute at issue in that case to "determine loss for other cases involving fraudulent claims against the United States." *Id.* at 1006 (citing *United States* v. *Adam*, 70 F.3d 776 (4th Cir. 1995) and *United States* v. *Castner*, 50 F.3d 1267 (4th Cir. 1995)).

Again in *Dawkins*, the Fourth Circuit held that regardless of the amount the Government may be entitled to collect, calculation of loss for sentencing purposes must be viewed differently than forfeiture. 202 F.3d at 715. And, in his dissent in *Henry*, Judge Henry illustrated how illogical reliance on the civil forfeiture statute would be through the following example:

> [T]he government has a civil cause of action in rem against a property from which drugs were sold, see 21 U.S.C § 881(a)(6), but the value of that property is certainly not used in determining the culpability of the dealers. In [the defendant's] case, the government has a civil cause of action in rem against the entire amount of benefits received during periods covered by fraudulently completed 1032 forms. [The defendant's] criminal culpability is another matter altogether.

164 F.3d at 1311.

Merely because the government has a claim in the instant case to seek forfeiture of the entire amount of benefits received by Hughley during the periods in which false statements were made, does not mean that Mr. Hughley's wrongful action caused a loss of this entire amount. That reasoning is contrary to the explicit application rules of the Guidelines, which require that loss be limited to actual loss. Here, the actual loss, and accordingly the severity of the offense, can only be fairly calculated by offsetting the total benefits received by those to which Hughley was legally entitled. Without such an offset, Hughley's sentence is not calibrated to his wrongful conduct, and such a result disregards the purpose of the Guidelines, and indeed the purpose of punishment in our criminal justice system. This Court should grant a writ of certiorari to reverse the decision of the Second Circuit and remand for re-sentencing in accordance with the correct calculation of the "amount of loss" under Section 2F1.1 of the Federal Sentencing Guidelines.

IV. A More than Minimal Planning Enhancement is Inappropriate when a Defendant is Convicted of an Exceptionally Simple Crime

The Second Circuit affirmed the district court's improper application of a two-level enhancement for "more than minimal planning" under the sentencing guidelines. U.S. Sentencing Guidelines Manual § 2F1.1(b)(2)(A) (1999). The Guidelines identify three circumstances in which this enhancement is warranted: (i) where the offense required "more planning than is typical for commission of the offense in a simple form"; (ii) where "significant affirmative steps were taken to conceal the offense"; or (iii) where "repeated acts" were committed over a period of time. *Id.* § 1B1.1, Application Note 1(f). *See also United States* v. *Rosa*, 17 F.3d 1531, 1552 (2d Cir. 1994). The Second Circuit found that Hughley's conduct was "repeated and deliberate." *Hughley*, 2000 U.S. App. LEXIS at *7. This decision is wrong and ignores an entire body of law that generally applies the enhancement when the crime also involved some level of complexity.

In support of its imposition of the planning enhancement, both courts found that Hughley made "at least three" false statements to the Department of Labor. (A. 76.) They therefore relied on the "repeated acts" language of the Guidelines commentary. This reliance was misplaced. Hughley's offense included only two false statements, not three, and it did not include the repetitive conduct over an extended period of time that has been properly held to warrant the more than minimal planning enhancement.

Courts have repeatedly held that at least three acts are required to warrant the enhancement – two acts do not suffice as a matter of law. *See United States* v. *Kim*, 23 F.3d 513, 515 (D.C. Cir. 1994) (finding that "repeated" contemplates at least three acts). Hughley's offense entailed two, not three, acts. Hughley was convicted of submitting two CA-1032 forms to the Department of Labor, one on October 23, 1995 and one on March 12, 1997. The third "occasion" to which the court referred occurred in January 1997, when Hughley mistakenly submitted a misdated CA-1032 form. (A. 22.) When Hughley was notified that the form he had submitted in January 1997 was misdated, he resubmitted a second CA-1032 form repeating the same information. (A. 23.)

The submission of the misdated form was the determinative factor upon which both courts relied in imposing the planning enhancement. This was improper because any culpability arising from the January 1997 submission is subsumed under Hughley's culpability for re-submitting the same CA-1032 form in March 1997. Indeed, Hughley was not awarded any benefits pursuant to the submission of the misdated form, as the Department of Labor required that he resubmit a correctly dated form. (A. 23.) Accordingly, imposition of the enhancement based on that finding was improper.

In addition, even assuming, *arguendo*, that Hughley made three false statements, imposition of the enhancement should nonetheless be reversed because it was not warranted by Hughley's offense. The enhancement is usually applied "to factual scenarios involving clear examples of repeated or complex criminal activity." *United States* v. *Lennick*,

917 F.2d 974, 978-80 (7th Cir. 1990). The cases in which "repeated acts" justify the planning enhancement thus typically involve a course of conduct including either active planning over a significantly long period of time or a high volume of acts in a somewhat shorter period of time. *See United States* v. *Allen*, No. 99 Civ. 1167, 2000 U.S. App. LEXIS 55, *2-*3 (2d. Cir. Jan. 5, 2000) (enhancement appropriate based on repetitiveness of thefts and on the planning entailed in the numerous affirmative steps); *United States* v. *Barrett*, 178 F.3d 643, 648-649 (2d. Cir. 1999) (enhancement appropriate where an embezzlement scheme took place over a period of six years); *United States* v. *Lewis*, 156 F.3d 656, 658 (6th Cir. 1998) (enhancement appropriate where thousands of false claims for complicated and expensive dental procedures were submitted). *See also United States* v. *Mau*, 45 F.3d 212, 214 (7th Cir. 1995) (enhancement appropriate where defendant kited a huge volume of checks over a period of seven months); *United States* v. *Bakhtiari*, 913 F.2d 1053, 1063 (2d. Cir. 1990) (enhancement appropriate where defendant had numerous contacts with a broker in which defendant impersonated a Government employee and gave false information); *United States* v. *Walbrook*, No. 92 Civ. 6095, 1993 WL 404065, *2 (S.D.N.Y. Oct. 1, 1993) (enhancement appropriate where a company was defrauded of twenty-nine checks over a three-month period). Accordingly, Hughley's two submissions of CA-1032 forms, and one submission of a misdated duplicate, do not constitute the "repeated acts" which have been held to give rise to an inference of more than minimal planning.

Furthermore, there was no evidence that Hughley's offense fell under either of the remaining two circumstances that warrant the planning enhancement – it involved no more planning than is typical for the offense, and no steps were taken to conceal the offense. Hughley's offense was exceptionally simple and devoid of any plan or scheme. Any "planning" involved in Hughley's offense was limited to that inherent in, and necessary to, the offense of which he was convicted. The false statements on two CA-1032 forms were one-word responses to questions regarding whether he had been employed in the previous fifteen months. Any planning involved in Hughley's offense was minimal, and limited to that typical for the offense. Accordingly, such "planning" is encompassed in the core of activity and reflected in the base offense level. Such purely incidental planning is not a proper basis for imposition of the two-level enhancement which, by definition, is designed to punish significant, atypical planning of an offense.

Likewise, there was no evidence that Hughley attempted to conceal his actions. Indeed, various witnesses at trial indicated that Hughley was consistently open and never attempted to hide his activities. (A. 40, 59, 62-63.) Thus, the more than minimal planning enhancement could not properly have been premised on Hughley taking affirmative acts to conceal his offense.

Imposition of the enhancement was not properly based on any of the three justifications set forth in the Guidelines commentary. Therefore this Court should grant a writ of certiorari to reverse and remand for re-sentencing.

CONCLUSION

This case presents difficult and novel issues arising in cases from all the circuits. The determination of loss under the Guidelines which is not well settled is of continuing importance to future sentencing of defendants. For all the foregoing reasons, petitioner Hughley respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

Samuel W. Seymour
CJA Appointed Counsel of Record
125 Broad Street
New York, NY 10004
(212) 558-3156
Counsel for Petitioner

August 15, 2000

UNITED STATES OF AMERICA, Appellee, -v.-
BOBBY L. HUGHLEY, Defendant-Appellant.

No. 99-1550

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2000 U.S. App. LEXIS 12472

June 2, 2000, Decided

NOTICE: **[1*]** RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of New York (Keenan, J.).

DISPOSITION: AFFIRMED.

CORE TERMS: enhancement, disability benefits, indictment, renewal, repeated, introduce evidence, full value, intoxication, sentencing, misdated

COUNSEL: APPEARING FOR APPELLANT: HELENE LANDAU (Samuel W. Seymour, Dianne L. Rosky, on the brief), New York, NY.

APPEARING FOR APPELLEE: ANDREW J. CERESNEY, Assistant United States Attorney (Mary Jo White, United States Attorney, Christine H. Chung, Assistant United States Attorney, on the brief), Southern District of New York, New York, NY

JUDGES: PRESENT: Hon. Roger J. Miner, Hon. John M. Walker, Jr., Hon. Sonia Sotomayor, Circuit Judges.

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED.

Defendant-appellant Bobby Hughley appeals from the September 9, 1999 judgment of the district court convicting him, upon jury verdicts of guilty, of two counts of making false statements in connection with the receipt of disability benefits in violation of *18 U.S.C. § 1920*. **[*2]** On appeal, Hughley contends that the district court committed two errors concerning the admission of evidence at trial and two errors at sentencing following trial. We affirm the judgment of the district court.

Hughley, a former postal worker, has received disability benefits since 1979. Each year, he is required by the Department of Labor ("DOL") to complete and submit the CA-1032 form, which requests information concerning, among other things, any work performed or income earned by a

disability benefit recipient. The government alleged, and the jury apparently believed, that Hughley falsely stated on several successive CA-1032 forms that he had not been employed or self-employed in the previous fifteen months. In actuality, the evidence demonstrated that, throughout the 33-month period covered by these forms -- from July 1994 to March 1997 -- Hughley owned and operated a produce business and personally hauled produce long-distance by truck to sell in Connecticut. The jury returned verdicts of guilty on both counts against Hughley, and the district court thereafter sentenced him to 12 months and one day of imprisonment and three years of supervised release, imposed a $ 200 special **[*3]** assessment, and ordered him to pay restitution of $ 68,354.76 to DOL. This appeal followed.

Hughley raises four issues on appeal. First, he contends that the district court erred at trial by excluding evidence of his alleged drug use. Specifically, Hughley sought to introduce evidence related to his admission to a hospital for treatment of cocaine addiction on March 12, 1997 -- the same day he submitted one of the forms -- in order to support a "voluntary intoxication" defense to the second count of the indictment. The district court excluded the evidence because it found that no "predicate had been laid for it through other testimony" and accordingly it would invite "too much speculation." We review evidentiary rulings for abuse of discretion, see *United States v. Anglin, 169 F.3d 154, 162 (2d Cir. 1999)*, find error only where the district court acted "in an arbitrary and

irrational fashion," *United States v. Pipola, 83 F.3d 556, 566 (2d Cir. 1996),* and reverse only where "there is a reasonable probability" that, had the evidence been admitted, "the result of the proceeding would have been different." *United States v. Smith, 987 F.2d 888, 892 (2d Cir. 1993).***[*4]**

We see no reversible error. Even if the proffered evidence was relevant under Fed. R. Evid. 401, its exclusion did not so substantially influence the jury that it might have changed the outcome of the trial. The proof of Hughley's guilt was strong. Moreover, the evidence Hughley sought to introduce was insufficient to support his intoxication defense without some additional testimony to establish how his cocaine use might have affected his ability to form the specific intent necessary to commit the crime charged. See *United States v. Steinberg, 525 F.2d 1126, 1132 (2d Cir. 1975)*(defendant not entitled to jury instruction on drug intoxication where there was no evidence as to how drugs affected him at the time of the alleged crime).

Second, Hughley argues that the district court erred by admitting evidence of defendant's work-related activities following March 1997. Specifically, even though the charges against defendant pertained solely to his misrepresentations about his employment prior to March 12, 1997, the district court allowed the government to introduce evidence concerning Hughley's renewal of a bank loan, attempted acquisition of a vacant lot for expansion **[*5]** of his business, and renewal of a permit to sell produce in the months after March 1997. This was

not in error. "There is no requirement that all the Government's evidence fall within the time period of the indictment, providing it is relevant to the charges." *United States v. Bagaric, 706 F.2d 42, 65 (2d Cir. 1983)*, abrogated on other grounds, *National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994)*. Each of the disputed pieces of evidence tended to demonstrate that Hughley was working during the fifteen months before March 1997. The fact that he sought renewal of annual loans and permits and land for expansion of his business at this time strongly suggests that his business was in operation during the period at issue in the indictment.

Third, Hughley contends that the district court improperly calculated the amount of loss for sentencing purposes because it failed to reduce the loss by the amount of benefits Hughley would have received absent the fraud. For offenses involving fraud, § 2F1.1 of the United States Sentencing Guidelines ("the Guidelines" or "U.S.S.G.") prescribes increases in offense **[*6]** level based on the amount of the loss. The Guidelines define "loss" as "the value of the money, property, or services unlawfully taken." U.S.S.G. § 2F1.1 Application Note 8. In this case, the district court determined that the loss was about $ 68,000, the full value of the disability benefits Hughley received during the period of the fraud. "We review legal interpretations of the Sentencing Guidelines construing the term 'loss' de novo and review factual findings supporting the court's offense calculation under a clearly

erroneous standard." *United States v. Koh, 199 F.3d 632, 642 (2d Cir. 1999).*

In our view, the district court did not err in concluding that the loss caused by the fraud was the full value of the benefits received. For one thing, *5 U.S.C.* § *8106*(b)(2) unambiguously requires the forfeiture of all benefits Hughley collected during the period that he "omitted or understated any part of his earnings." Moreover, in Hughley's case, it would not have been clearly erroneous to conclude that benefit payments would likely have been eliminated altogether had he supplied truthful information to the government, especially given the extensiveness **[*7]** and rigor of the work he was actually performing. Since loss "need not be determined with precision," accordingly we find that the district court fulfilled its obligation to "make a reasonable estimate of the loss, given the available information." U.S.S.G. § 2F1.1 Application Note 9.

Fourth, Hughley argues that the district court erred in imposing a two-level enhancement for "more than minimal planning" under U.S.S.G. § 2F.1(b)(2)(A). The Guidelines require application of the enhancement where the offense involved, among other things, "repeated acts over a period of time, unless it is clear that each instance was purely opportune." U.S.S.G. § 1B1.1 Application Note 1(f). The district court found that the enhancement applied in this case because "there were false statements made to the Department of Labor on at least three occasions."

The district court acted properly in imposing the enhancement here. The plain language of the Application Notes -- particularly the use of the word "repeated" --supports the district court's view that three occasions is enough. Cf. *United States v. Bridges, 50 F.3d 789, 792 (10th Cir. 1994); United States v. Kim, 306 US. App. D.C. 205, 23 F.3d 513, 516-18 (D.C. Cir. 1994);* **[*8]** *United States v. Maciaga, 965 F.2d 404, 407 (7th Cir. 1992).* And its finding that Hughley submitted three false statements was not clearly erroneous. Defendant argues that the second and third statements should be considered as one because they were essentially identical copies of the same CA-1032 form, the first a misdated version submitted in January 1997, the second a correctly dated version submitted in March 1997. However, Hughley's resubmission of the false application after learning that the first version was misdated was plainly a separate, conscious effort to deceive the government. Finally, contrary to defendant's contentions, the enhancement may properly be imposed even where the crime is not complex, provided it is repeated and deliberate. See *United States v. Barrett*, 178 F.3d 643, 649 (2d Cir. 1999).

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

United States District Court

Southern District of New York

UNITED STATES OF AMERICA

v.

BOBBY HUGHLEY

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

(S1)

Case Number: 1:98CR00695-001

Samuel Seymour, Esq.

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1&2 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. ' 1920 &2	**False Statements to Receive Federal Employee's Compensation.**	**03/12/1997**	**1&2**

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) Original Information is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: **256-92-3224**

Defendant's Date of Birth: **01/10/1955**

Defendant's USM No.: **41271-054**

Defendant's Residence Address:

317 Dixwell Ave.

New Haven CT 06511

Defendant's Mailing Address:

09/09/1999

Date of Imposition of Judgment

Signature of Judicial Officer

Hon. John F. Keenan, USDJ

Name & Title of Judicial Officer

A.10

317 Dixwell Ave.

New Haven
CT 06511 09/09/99
Date

Judgment-Page 2 of 6

DEFENDANT: BOBBY HUGHLEY

CASE NUMBER: 1:98CR00695-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **a year and a day**.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☒ The defendant shall surrender to the United States Marshal for this district:

☒ at 10:00 a.m. on 11/29/1999 .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the Institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

A.12

UNITED STATES
MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: BOBBY HUGHLEY

CASE NUMBER: 1:98CR00695-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).

The defendant will participate in a program approved by the Probation Department for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol, The defendant will not be required to pay for the costs of services rendered.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any

unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the

probation officer:

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: BOBBY HUGHLEY

CASE NUMBER: 1:**98CR00695-001**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 200.00**	**$**	**$68,354.76**

☐ If applicable, restitution amount ordered pursuant to plea agreement.... $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____ .

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until ____ . An Amended Judgment in a Criminal Case will be entered after such a determination.

☒ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

U.S. Department of Labor, Office of Workers Compensation	$68,354.76	$68,354.76
Totals:	**$68,354.76**	**$ 68,354.76**

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: BOBBY HUGHLEY

CASE NUMBER: **1:98CR00695-001**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☐ in full immediately; or

B ☒ $ **200.00** immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____ ; or

D ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____(*e.g. equal, weekly, monthly, quarterly*) installments of

$ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Restitution shall be paid at the rate of 15% of the defendant's gross earnings over the 36 month period of Supervised Release. The defendant shall be discharged from making restitution payments at the end of his term of Supervised Release if he was in compliance with the Court's payment schedule. If the defendant receives any windfall financially, this is to be utilized to pay restitution immediately.

☐ Joint and Several

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: BOBBY HUGHLEY

CASE NUMBER: **1:98CR00695-001**

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

The Total Offense Level determined by the Court is 13.

Guideline Range Determined by the Court:

Total Offense Level: 13

Criminal History Category: I

Imprisonment Range: 12 to 18 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 4,000.00 to $ 40,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ ____
68,354.76

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range,

that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

v. S1 98 Cr. 695 (JFK)

BOBBY HUGHLEY,

Defendant.

- x

March 17, 1999
2:20 p.m.
New York, N.Y.

Before:

HON. JOHN F. KEENAN,

District Judge,
and a jury.

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
BY: ANDREW CERESNEY
RICHARD OWENS,
Assistant United States Attorneys

SULLIVAN & CROMWELL
Attorney for defendant
BY: SAMUEL SEYMOUR
DIANNE ROSKY

Present: Ralph Franzese (Postal Inspector)

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that a person could work four hours a day and they returned to work with their employing agency for four hours a day, then we would pay the difference between what they were making at their job working four hours a day and what they were making at the time of their injury when they worked eight hours a day.

Q. Can you give us an example just in sort of job terms?

A. Yes, sir. If, for example, a person was a letter carrier and the letter carrier injured his leg or her leg and could not perform their job as a letter carrier, and they returned to work for four hours a day at a desk job, such as a computer operator, we would pay the difference between what they were making as a letter carrier and what they are now making as a computer operator.

Q. Now, what would be the relevance of the person's work capability in that determination of the work they were able to do?

A. I'm sorry, sir, would you repeat that, please?

Q. Someone who's partially disabled, how would you determine the amount of money that you would use as the comparison to what they were earning before?

A. We would determine what their salary for their date-of-injury job was. For example, say a person, the letter carrier, the letter carrier was making let's say $40,000 a year, and in their capacity as a computer operator, they are only able to make $20,000 a year. We would pay the

difference. In other words, we would pay them the additional $20,000 per year.

Q. What type of information would you use to determine what job people could do after they are injured?

A. We would use the medical information, medical reports submitted by their attending physicians, and we would also use the Form 1032 which is a statement that the claimant completes every year.

Q. Now, would actual earnings be a factor in the decision?

A. Absolutely.

Q. Would those be the only factor?

A. No, sir.

Q. Why is that?

A. A claimant may have the potential of a wage -- of earning a wage even though he or she is not actually earning a wage. For example, if a person was highly qualified or had a very good aptitude in mathematics, or let's say in computer skills, it's a little bit easier, if a person had an aptitude for computer skills, we could use that as a basis for determining what that person could do as a computer operator.

Q. What, if anything, would your office do for somebody who has those skills, but is not actually working as a computer operator?

A. We would do -- we would refer that person to our vocational rehabilitation unit who could work with our claimants to develop opportunities for them to return to work in some capacity, let's say

as a computer operator.

Q. How often do claimants get paid?

A. Claimants get paid in two ways: They get paid on what we call a daily roll payment or an automatic roll payment. The daily roll payment requires that the claimant submit a form to us every two weeks for payment. It would almost be like submitting a pay stub, if you will. And we would then enter a transaction into the computer to pay the claimant for the two weeks that he or she did not work.

The second way that we would do it is the automatic roll payment, which means that we would pay the claimant automatically every 28 days.

Q. Why would somebody be on a daily roll as opposed to the automatic roll?

A. It would depend on the length and severity of their injury. If the medical information that we have supports that the claimant will be out of work for at least 90 days, we would put that claimant on the automatic roll payment. It's easier for the claimant. He or she does not have to submit forms every two weeks. And quite honestly,
$40,000 a year, and in their capacity as a computer operator, they are only able to make $20,000 a year. We would pay the difference. In other words, we would pay them the additional $20,000 per year.

Q. What type of information would you use to determine what job people could do after they are injured?

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medical reports submitted by their attending physicians, and we would also use the Form 1032 which is a statement that the claimant completes every year.

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Q. What, if anything, would your office do for

A. Yes, sir.

Q. Can you look at part A and can you read the first two sentences of part A. That is, read this section --

THE COURT: Mr. Ceresney, I am going to let you highlight things but, you know, if it is in evidence, if it is in front of them, all you are doing is cluttering the record here.

MR. CERESNEY: OK, your Honor.

THE COURT: I understand what you are doing, but I am not going to let you just duplicate and duplicate. Go ahead. Let's limit it to the kernel

of what you want.

MR. CERESNEY: OK.

Q. Could you look to the second paragraph there about self-employment?

A. Yes, sir.

Q. Can you just read that particular paragraph?

A. "Report all self-employment or involvement in business enterprises. These include but are not limited to farming, sales work, operating a business, including a store or restaurant, and providing services in exchange for money, goods or other services."

Q. Let me stop you right there. Can you also read just the last two sentences of that paragraph.

A. "Report activities such as keeping books and records or managing and or overseeing a business of any kind including a family business. Even if your activities were part time or intermittent you must report them."

Q. Does the form ask the individual to report involvement in business enterprises even if there was a loss from that business?

A. Yes, sir.

Q. Let's look to question No. 1. I see that question No. 1 asks, "Did you work for any employer during the past 15 months?" What was Mr. Hughley's answer to that question?

A. "No."

Q. I see that there are follow-up questions to that. Did Mr. Hughley put anything to those follow-up questions?

A. No, sir.

Pizza - direct

Q. Turn to question No. 2. It asks, "Were you self-employed or involved in any business enterprise in the past 15 months?" What did Mr. Hughley put down?

A. "No."

Q. Turn to question No. 3. "If you answered no to both questions 1 and 2, state whether you were unemployed for all periods during the past 15 months?" What did Mr. Hughley put down?

A. "Yes."

Q. Finally looking at Volunteer Work, "During the past 15 months did you perform any kind of volunteer work for which any kind of monetary or in-kind compensation sayings was received?" What did Mr. Hughley indicate?

A. "No."

Q. Let me just go back to question No. 2, the self- employment or involvement in business enterprise question. What is the purpose of that question?

A. The purpose of that question is to determine if the claimant was involved in any self-employment or in any business enterprise.

Q. How does the Office of Workers' Compensation program use that information?

A. We would use that information to determine if the claimant's ability to work, if he or she was self-employed then they would have some capacity to work and we would reduce their compensation benefits accordingly.

Q. What would you do if the claimant responded no?

A. We would do nothing, sir.

Q. And if the claimant responded yes, what would you then do?

A. We would develop additional information, if the information that was provided was not adequate concerning what type of work the claimant was doing and at the same time we would write to his attending physician and advise his attending physician that the claimant is currently working as whatever the claimant indicated, and ask the

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Q. Did Mr. Hughley indicate that he had performed any volunteer work in the prior 15 months?

A. He indicated that he had not.

Q. Did this form contain the same certification about the signatures as the previous form, Government's Exhibit 1?

A. Yes, sir, it does.

Q. What was the time covered by this statement?

A. Time covered by the statement was 15 months prior to the date it was completed.

Q. Did you ever communicate with Mr. Hughley about this form?

A. Yes, I did.

Q. Why?

A. The form had the incorrect signature date on it, sir.

Q. I'm showing you Government's Exhibit 7 for identification. Do you recognize Government's Exhibit 7?

A. Yes, sir, I do.

Pizza - direct

Q. You mentioned, just to go back to Government's Exhibit 2, you mentioned that it was misdated. Where on the form is it actually misdated?

A. On the last page, after the certification.

Q. What is the date?

A. Right next to the signature. It is dated January 6, 1996, '96.

Q. Returning to Government's Exhibit 7, you said it was a letter from you. Did you write that letter?

A. Yes, sir, I did.

Q. What did you do after you wrote it?

A. I sent it to Mr. Hughley, sir.

Q. Was a copy of that letter maintained in the Department of Labor files?

A. Yes, sir, it was.

Q. Was that maintained in the regular course of business?

A. Yes, sir, it is.

MR. CERESNEY: The government offers Government's Exhibit 7.

MR. SEYMOUR: No objection, your Honor.

THE COURT: Government's Exhibit 7 is received. The jury may turn to it in the exhibit folder if they wish.

(Government's Exhibit 7 received in evidence)

Q. What did you ask Mr. Hughley to do in that letter?

A. I asked him to complete a new CA-1032 because I assumed that he meant January of 1997, rather than January of 1996.

Pizza - direct

Q. From your review of the file did Mr. Hughley submit another 1032 in response to that letter?

A. Yes, sir, he did.

Q. I show you Government's Exhibit 3. Do you recognize Government's Exhibit 3?

A. Yes, sir, I do.

Q. What is Government's Exhibit 3?

A. It is a CA-1032.

Q. What's the date on that?

A. March 12, '97.

Q. Is that the 1032 you were referring to which Mr. Hughley submitted in response to that letter?

A. Yes, sir, it is.

Q. How did you get that form?

A. It was mailed to our office, sir.

Q. How do you know that?

A. By the date, perforated date stamp at the top of the form.

Q. Is that the date stamp up at the top left-hand corner?

A. Yes, March 14, '97.

Q. Where was that received?

A. At the Office of Workers' Compensation.

Q. Where is that located?

A. 201 Varick Street in New York, New York.

Q. Did Mr. Hughley sign this form?

A. Yes, sir.

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file.

MR. CERESNEY: The government offers Government's Exhibit 8 into evidence.

MR. SEYMOUR: No objection, your Honor.

THE COURT: All right, 8 is received. The jury may look at 8 in the binder.

(Government's Exhibit 8 received in evidence)

Q. Directing your attention to Government's Exhibit 8, what was asked in Government's Exhibit 8, question 2A? What kind of information does it ask for?

A. It says "Were you self-employed during any time covered by this form?"

Q. Just to clarify, what is the time covered by that form?

A. The 15 months prior to the completion.

Q. What did Mr. Hughley answer there?

A. "Yes."

Q. Does it ask for further information about that employment?

A. Yes, sir, it does.

Q. What kind of information did Mr. Hughley provide to that form?

A. He indicated his dates of self-employment from September 4, '86 to June 4, '87, and from September 4, '87 to June 4, '88. It asks for the description of work performed, and he answered transportation service. It asks for the number of hours work per week and Mr. Hughley indicated 25. It asks for the rate of pay, which was indicated as $1,170 per month. It also asks for the name of the business or firm, which was unanswered.

Q. Did you review the file for the period after this form was submitted?

A. Yes, sir.

Q. From your review of the file do you know what

happened after Mr. Hughley submitted this form?

A. Yes, sir. Immediately after that a letter was sent to Mr. Hughley requesting additional information concerning his business activity.

Q. Let me show you Government's Exhibits 9 and 10. Let me first show you Government's Exhibit 9. What is Government's Exhibit 9?

A. Government's Exhibit 9 is a letter to Mr. Hughley.

Q. What's the date on that letter?

A. March 2, 1988.

Q. What happened to the original of this letter?

A. It was mailed to Mr. Hughley.

Q. Was a copy of that maintained in the Office of Workers' Compensation files?

A. Yes, sir.

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Q. What's attached to this letter?

A. The attachment is the CA-1032 itself.

Q. It says Second Request on the top. Why does it say Second Request?

A. We apparently had sent the first request and had not received the response.

Q. If you could look to the second page of this, the section that says "dates covered by this statement." What are the dates covered by the statement?

A. Statement covers the period 15 months prior to the date of your completion and signature.

Q. Did Mr. Hughley actually send the Office of Workers' Compensation a completed copy of the 1032 soon thereafter?

A. Yes, sir.

Q. Let me show you Government's Exhibit 16. Do you recognize Government's Exhibit 16?

A. Yes, sir, I do.

Q. What is it?

A. It is a CA-1032.

Q. Is this the CA-1032 that was filed after Government's Exhibit 15?

A. Yes, sir.

Q. What is it dated?

A. October 19, '93.

Q. Is it signed?

A. Yes, sir, it is.

Q. By whom?

A. By Mr. Bobby Hughley.

Q. How did it get into the OWCP file?

A. It was delivered to our office, sir.

Q. How do you know that?

A. There was a report contact in the office file, sir.

Q. Was this form maintained in the ordinary course of the Office of Workers' Compensation business?

A. Yes, sir, it was.

MR. CERESNEY: The government offers Government's Exhibit 16 into evidence.

MR. SEYMOUR: No objection, your Honor.

THE COURT: 16 is received. The jury may study it.

(Government's Exhibit 16 received in evidence)

Q. Looking at Government's Exhibit 16, does this form ask about self-employment?

A. Yes, sir, it does.

Q. Let me direct your attention to that section. What is the question that is asked in section 2A?

A. "Were you self-employed during any time covered by this form? Answer yes or no."

Q. What did Mr. Hughley answer?

A. "Yes."

Q. Did Mr. Hughley give particular dates when he was self-employed during that period?

A. Yes, sir.

Q. What were the dates that he put down?

A. 11/15/91 to 5/15/92 to 12/30/92.

Q. So what was the last date of work that was indicated in this form?

A. 12/30/92.

Q. But what period did this form cover?

A. The 15 months prior to October '93, which would be approximately September of '92.

Q. And did Mr. Hughley indicate any work during 1993?

A. No, sir, he did not.

Q. What kind of work did Mr. Hughley indicate?

A. Long distance hauling.

Q. I see that it says "paid driver."

A. Yes, sir.

Q. Do you have any idea what that means?

A. Yes, sir, he paid someone else, it appears that he paid someone else to drive for him.

Q. How do you know that?

A. He attached his tax return to that form, to this

MR. SEYMOUR: No objection.

THE COURT: 19 is received. The jury may read it.

(Government's Exhibit 19 received in evidence)

Q. What did Government's Exhibit 19 say about Mr. Hughley's disability?

A. It says "The patient continues to be totally disabled and requires treatment."

Q. After the Office of Workers' Compensation received this letter, did it do anything?

A. I don't believe so, sir.

Q. Why not?

A. Because the claimant indicated that he had stopped work on December 30, 1992, the medical report from his physician dated March 28, '94 indicated that he had been examined on December 27, '93 and found to still be totally disabled and requiring continuing medical treatment.

Q. When was the next 1032 that Mr. Hughley filed?

A. I believe it was '95, sir.

Q. Is that Government's Exhibit 1?

A. Yes, sir.

Q. What was the date of that 1032?

A. October 23, '95.

Q. Did Mr. Hughley report any self-employment or involvement in any business enterprise on that 1032?

A. No, sir, he did not.

MR. CERESNEY: Your Honor, may I have a moment?

THE COURT: Yes.

(Pause)

MR. CERESNEY: The government has no further questions for this witness.

THE COURT: You can begin cross. I don't expect you to finish it if it is going to be extended cross but you can begin cross.

MR. SEYMOUR: Thank you, your Honor.

THE COURT: The jury, until Mr. Seymour, if he does refers to one of the exhibits, the jury can close the document binder.

CROSS - EXAMINATION

BY MR. SEYMOUR:

Q. Good afternoon, Mr. Pizza.

A. Good afternoon, sir.

Q. You said that you joined the Department of Labor in 1995, is that right?

A. '94, December of '94.

Q. And you came from an insurance company, right?

A. Yes, sir.

Q. And the first thing you did when you joined the Department of Labor was to go into a training program, is that right?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. S1 98 Cr. 695 (JFK)

BOBBY HUGHLEY,

Defendant.

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March 18, 1999
10:15 a.m.
New York, N.Y.

Before:

HON. JOHN F. KEENAN,

District Judge,
and a jury.

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
BY: ANDREW CERESNEY
RICHARD OWENS,
Assistant United States Attorneys

SULLIVAN & CROMWELL
Attorney for defendant
BY: SAMUEL SEYMOUR
DIANNE ROSKY

Present: Ralph Franzese (Postal Inspector)

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Q. And it's maintained in the ordinary course by the Department of Labor?

A. Yes.

MR. SEYMOUR: Defense offers Exhibit C, your Honor.

MR. CERESNEY: No objection.

THE COURT: Received.

(Defendant's Exhibit C received in evidence)

Q. Now, turning to tab C, and you in particular, Mr. Pizza, this is a document dated September 21, 1992. Do you see that?

A. Yes, sir.

Q. And this is a form that's filled out and apparently signed by Mr. Hughley, isn't that right?

A. Yes, sir.

Q. And submitted to the Department of Labor?

A. That's correct, sir.

Q. And it was among the things you reviewed in February '96 when you looked over the file?

A. Yes.

Q. It follows from your review of this document, does it not, that Mr. Hughley was telling the Department of Labor he was involved in the vegetable and produce business and he was self-employed, isn't that right?

A. In September of 1992, that's correct.

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That you have been shown are from the Department of Labor file. Is the contents of that file available to the United States Postal Service?

A. Yes, sir, they are.

Pizza - cross

Q. How does that work? Is there a duplicate file or do they have access to it on a regular basis?

A. No, sir. The employing agencies are permitted to review the files of their employees.

Q. Do they have to come to the Department of Labor to do a periodic examination or do you all send them a copy?

A. Generally, sir, we don't have time to send copies so we ask if they would like to review the file, they can come to our office to review the file.

Q. Do you know if postal representatives inspected Mr. Hughley's file in or around this period?

A. I can't say in or around this period, but I am sure that they did review the file, yes, sir.

Q. Let me ask you to turn, just you, Mr. Pizza, to Exhibit E.

This is, is it not, another document from the Hughley file at the Department of Labor?

A. Yes, sir.

Q. Among the materials you reviewed in preparation for your testimony?

A. I'm sorry, sir?

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just talked about I want to ask you some things about your general interactions with Mr. Hughley. Let me direct your attention to the period of 1994 to 1997. How often, if ever, did you see Mr. Hughley during that period?

A. What were the dates again?

Q. 1994, mid '94 to mid '97.

A. I would normally see him two to three times per year.

Q. What was he doing when you would see him?

A. At times he was conducting his business as an itinerant vendor. Other times he may have been on the street talking to somebody not engaged in business.

Q. On the occasions when you saw Mr. Hughley, did you arrange a visit or was it a random occasion?

A. There were both. Some of them were random and some of them were in response to whether or not he renewed a license that year.

Q. What was the location where you would see Mr. Hughley operate his business during that period?

A. Approximately the 300 block of Dixwell Avenue.

Q. That's in New Haven?

A. Yes, in New Haven.

Q. Was Mr. Hughley there all the time?

A. No, he was not.

Q. What type of business when he was there was he running?

A. Most occasions he was selling just vegetables.

Q. What about on other occasions?

A. There was one other time that I had licensed a white trailer that was selling fried fish.

Q. You mentioned --

THE COURT: I'm confused. Let me see if I can unconfuse myself. This white trailer that was selling fried fish, was Mr. Hughley involved with the white trailer?

THE WITNESS: There was a license for that white trailer in Bobby Hughley's name.

THE COURT: OK.

Q. Was it your impression --

MR. SEYMOUR: Your Honor, could we have a time frame on this?

THE COURT: Sure. When as best you remember did you see the white trailer out of which they were selling or someone was selling fried fish for which Mr. Hughley had a license?

THE WITNESS: About when? I believe -- there is an inspection sheet but I believe it was in September of '95, possibly.

Q. You mentioned that Mr. Hughley had a license for that trailer. Who actually was operating the business selling prepared foods out of that trailer?

A. Well, the trailer at that time was not in operation. I had arranged I believe an inspection at that time, and I met Mr. Hughley at the site and I did an inspection, and from the questions I asked it was, the hours of operation were mainly on the weekends late at night.

Q. You mentioned before that you also saw

Mr. Hughley selling vegetables most of the time?

A. Yes.

Q. What types of vegetables did he sell?

A. The only thing I can remember is collard greens, and watermelons.

Q. Did you ever discuss -- excuse me. What, if anything, did Mr. Hughley tell you about where he got his vegetables?

A. We had a conversation and I believe in that time period there was a question as to -- it came up in the course of the conversation that the vegetables were from down south.

Q. Did he tell you how he got them up north?

A. I assumed it was himself.

Q. From 1994, mid-1994 to mid-1997, what did the business look like when he was selling vegetables?

A. Sometimes Mr. Hughley was operating from a truck at times; other times for a short period of time it was the white trailer. And at some point, and I'm not sure when, he did go to a trailer that was pretty much a tractor trailer box car.

Q. Were there customers at this business when you were around?

A. There were people I assumed to be customers when I was there.

Q. Were there people assisting Mr. Hughley?

A. There was people that would assist him, would help him out.

Q. Approximately how many?

A. I don't know.

Q. During this period what did you observe Mr.

Hughley do when he was running his business, what types of things?

A. I would see him talk to people that were looking, you know, purchasing vegetables and direct one or two people to move a box for him or something of that nature.

Q. Did you see him make any sales?

A. I can't recall, no.

Q. You mentioned earlier that you issued Mr. Hughley a permit in 1994.

A. Yes.

Q. I am showing you Government's Exhibit 30. What is Government's Exhibit 30?

A. This is an application for permission to operate a food service establishment.

Q. Who is the applicant?

A. The applicant is Bobby L Hughley.

Q. What's the date of that application?

A. It's dated 18 July 1994.

Q. Whose signature is on that application?

A. It is signed Bobby Hughley.

Q. Is that Bobby Hughley's signature?

A. Yes, it is.

Q. How do you know that?

A. This is the application we filled out together on the street.

MR. CERESNEY: The government offers Government's Exhibit 30.

MR. SEYMOUR: No, your Honor.

THE COURT: 30 is received. The jury may turn in the black folder to Exhibit 30.

(Government's Exhibit 30 received in evidence)

Q. Mr. Rubano, who actually filled out this form?

A. Bobby Hughley.

Q. I see that there's a space for tradename or business. What business is indicated there?

A. The tradename is Georgia Pride Meats and Produce.

Q. Does it give an address?

A. Yes, 330 Dixwell Avenue in New Haven.

Q. Did you sign this application?

A. Yes, I did, I approved it.

Q. I see here that there's a box for individual and corporation.

A. Yes.

Q. I see that "individual" is checked off?

A. Yes.

Q. What does that mean?

A. We assume it to be the business is owned by the individual that's named as the applicant.

Q. And the applicant here was who?

A. Bobby L. Hughley.

Q. Did Mr. Hughley obtain any other permits from your office?

A. Yes.

Q. When did that July 18, 1994 permit expire?

A. That would have expired May 1, 1995.

Q. Let me show you Government's Exhibit 31 for identification.

If I could just move back for a second before we look at 31 to Exhibit 30. What does Government's Exhibit 30 actually authorize Mr. Hughley to do?

A. Allows him to operate as an itinerant vendor.

Q. Where?

Rubano - direct

A. Anywhere he chooses in the City of New Haven.

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out of your official duties either as an inspector or as a licensor of his businesses?

A. No. I would say no.

Q. Was there anything that you observed about the way that Georgia Pride was run that suggested to you there was an effort to conceal the business activities?

A. No.

Q. This was not a clandestine activity?

A. No, it wasn't.

Q. It was open and, in fact, he was hoping more people would see it and become customers?

A. Yes.

Q. Did he at any time ever ask you not to tell anybody about his business?

A. I don't recall the conversation.

THE COURT: Hold it. When you say you don't recall, do you mean you don't remember one way or the other or it's your best recollection that there was no such conversation?

THE WITNESS: There was no such conversation.

THE COURT: Thank you.

Go ahead, Mr. Seymour.

Q. You mentioned earlier a fellow by the name of John Blanks, you read that name. Who is that?

A. I do not know.

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A. Yes, he did.

Q. How do you know that?

A. Periodically I am required to be in the neighborhood. Dixwell Avenue was a major thoroughfare in New Haven. Just riding by we made what is called a windshield inspection, looking through the car you could see he was selling produce and vegetables out there.

Q. Can you give me a time period?

A. That would have been roughly from September through -- through November of 1995.

Q. And approximately how often would you see Mr. Hughley operating during that period?

A. I would only be out in that period -- maybe once every couple of weeks I would go out.

Q. You saw him operating throughout that period?

A. Yes.

Q. What did you see when you saw Mr. Hughley's business in that period?

A. Roughly, he had set up maybe some milk crates and maybe a 4 by 8 fold-up table where he would have some collard greens and other vegetables and produce that were out there.

Q. And how much produce did he have?

A. Probably enough to cover a few milk cartons on the table.

Q. How was it arranged?

A. It was kind of cascading from the milk cartons up to the table, milk cartons being on the ground and the table being up.

Hogan - direct

Q. What, if anything, did Mr. Hughley say about where he got the produce?

A. He went down south to get his product.

Q. What did he tell you when you learned that?

A. He liked to go down to get his product because he pretty much liked to pick out his own stuff.

Q. And what types of things did you see Mr. Hughley doing as part of running that business?

A. Remember, I was riding by so it was at a glance most cases. Usually I'd see him moving about, maybe moving the produce from place to place, maybe moving -- sometimes there was -- produce comes in little wooden crates. You may see him do that or putting more produce out.

Q. Did you ever see any customers there?

A. From time to time, yes.

Q. Did you ever see people make any purchases?

A. I can't say I saw money exchanged, but yeah, there were customers.

Q. Did Mr. Hughley have other people helping him in the business?

A. It was kind of hard to tell who was customers or who wasn't, but it appeared there was a gentleman that helped him move stuff around.

Q. Would there be periods during that time when Mr. Hughley's stand would not necessarily be open?

A. Yes. He was a periodic business. It was almost like he'd make a run to get the produce and then when he was gone stop and go get more and take some time.

Q. How do you know that?

Hogan - direct

A. Because when I would ride by periodically, you'd see milk crates just laying there. He wasn't there. He advised me he would have go get his produce.

Q. So he told you he had gone down south?

A. Yes.

Q. Now, you said you saw him throughout the fall of 1995. What happened after that?

A. Pretty much the winter months came and he just kind of disappeared for a while. Then my next contact with him would have been in the spring of '97. I pretty much thought that seeing that we hadn't seen him for quite some time, it was a done deal. Then Bobby came back down to the office, Mr. Hughley came back down to the office, and was interested in leasing the land again.

Q. Now, let me ask you this: You said you didn't see Mr. Hughley throughout 1996. Did you actually go out there a lot during that period?

Q. In the course of your work have you met Bobby Hughley?

A. Yes.

Davis - direct

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is Dixwell

Q. ` Mr. Hughley?

A. I met Mr. Hughley around, I'd say, June of 1997.

Q. How did you meet Mr. Hughley?

A. Mr. Hughley called in one day because he was interested in a vacant lot that's adjacent to his residence.

Davis - direct

Q. What was he interested in doing with that lot?

A. He wanted to put -- start a business. He wanted to put a business on that lot.

Q. Which lot was that?

A. The lot is 313 Dixwell Avenue.

MR. SEYMOUR: Your Honor, I object here. We are talking about a time frame that begins some months after the end of the relevant period in this case and apparently doesn't relate back at all. I object to this testimony and ask that it be stricken.

MR. CERESNEY: Your Honor, we will demonstrate how it relates in about three or five minutes.

THE COURT: I accept the government's representation. The objection is overruled. If you do not, however, you are entitled to renew your application with a motion to strike

Long - cross

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Q. Once again, if you could just describe what these documents are?

A. The first page is a request from Harry Poole to the insurance company requesting that the policy be cancelled for nonpayment of premium to the agent. The second page is a courtesy notice from Premium Finance Company to Mr. Hughley in reference to his cargo policy.

The third page is a courtesy notice from Premium Finance Company to Mr. Hughley in reference to his commercial auto liability policy.

And the fourth page is a notice of cancellation from Canal Insurance Company to Mr. Hughley for cancellation of his physical damage policy.

Q. The notice of cancellation that's the first page of Exhibit O comes from your company and is going to the insurance company?

A. Yes, sir.

Q. And that's because the policy, the premiums on the policy are paid through you as the agent?

A. No, sir.

Q. Who received the premiums if they were paid?

A. The down payment would have been paid to our office and then the monthly payments would have gone to Premium Finance Company.

Q. How did you learn, how did you come to learn that the premiums were not being paid?

A. We were notified from the Premium Finance Company.

Q. Finally, Ms. Long, if you would look at Exhibit P which is --

THE COURT: I'm not sure I am keeping track correctly. Maybe I'm not. Mr. Ryan is better than I am.

Is O offered?

THE CLERK: Yes.

THE COURT: OK. I got fouled up because I don't have the fourth page. O is in evidence. We are going now to P for identification. Go ahead.

Q. Once again, Ms. Long, these are documents that are maintained in Poole and Associates' files and were produced in the course of this litigation to the government?

A. Yes, sir.

Q. And you believe these are accurate copies of such documents?

A. Yes.

MR. SEYMOUR: We offer P, your Honor.

MR. CERESNEY: No objection.

THE COURT: P is received. The jury can look at P.

(Defendant's Exhibit P received)

Q. Am I correct that what we have behind tab P is the documents relating to the cancellation of the third policy you testified about?

A. Yes, sir.

Q. And on the second page inside the circle there is the word Underwriting Reasons. That's what you were referring to previously?

A. Yes, sir.

MR. SEYMOUR: Nothing further, your Honor. Thank you.

THE COURT: Thank you. Redirect.

MR. CERESNEY: Very briefly.

REDIRECT EXAMINATION

BY MR. CERESNEY:

Q. Ms. Long, do vehicles have to be registered to operate in the state of Georgia?

A. Yes, they do.

Q. What proof of insurance has to be provided at the time of registration?

A. Sometimes you can just take a liability card, other times the tag office will take your word for it.

Q. Did Mr. Hughley get a liability card when he took out the 1984 policy?

A. Yes, he did.

Q. Did he get one when he took out the '95 policy?

A. Yes.

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A. Mr. Houston?

Q. Yes?

A. Yes.

Q. Does Mr. Houston run a business?

A. Yes.

Q. What kind of business does he run?

A. At the present time he is a -- he hauls gravel. He's a trucker, a local trucker.

Q. And at that time what kind of business did he run back in 1992, say?

A. He was in produce.

Q. What kind of produce?

A. Watermelons and other.

Q. Is that down in Georgia?

A. Yes.

Q. How did your previous relationship with Mr. Houston affect your decision to loan money to Mr. Hughley?

A. Mr. Houston recommended Mr. Hughley for a loan.

Q. So did it make it more likely that you would issue a loan to him?

A. Yes.

Q. What if any of the paperwork did you create in making these loans?

A. The actual note itself.

Q. What kind of information does the note contain?

A. The note contains of course the bank name, the person's name and description of the collateral if any that was used, interest rate and interest

payments and stuff like that.

Q. Who usually signs the note?

A. The person borrowing the money.

Q. What is the significance of the note?

A. It ties the person to the loan. It represents his ownership of the note.

Q. Who signed the loan papers for the loans that you made to Mr. Hughley?

A. Mr. Hughley.

Q. What kind of loan did Mr. Hughley initially request?

A. The first one was in 1992.

Q. That's what you testified before.

A. For the purchase of a truck, I believe.

Q. Was that the only truck purchase loan that you issued to Mr. Hughley?

A. No.

Q. What if any other types of loans did you give Mr. Hughley?

A. I gave him -- well, I gave him several loans.

Q. What were those other loans? What type were they?

A. Business loans.

Q. What is a business loan?

A. It's a loan that we issue in which the primary purpose of it would be for a business, commercial type business.

Q. When you issue a loan do you ask the borrower any questions about the type of business they are going to conduct?

A. Generally, yes.

Q. Why would you ask those questions?

A. Well, we like to know what he's going to do and what would be his ability to pay the loan back.

Q. What, if anything, did Mr. Hughley tell you about what he was going to do with the business loans that you gave him?

A. He was going to use them for hauling.

Q. Did he tell you what he was going to haul?

A. Produce.

Q. What if any paperwork was there for the loans that you issued to Mr. Hughley?

A. Just the note itself.

Q. Let me show you Government's Exhibit 50. Do you recognize Government's Exhibit 50?

A. Yes.

Q. What is it?

A. It's a loan in the amount of $5500 to a Bobby Hughley.

Q. What is the date of that loan?

A. 11/1/93.

Q. What kind of loan is that?

A. Business loan, commercial loan.

Q. Are you familiar with Mr. Hughley's signature?

A. Yes.

Q. How's that?

A. The notes that he signed when he came into the bank.

Q. Who signed Government's Exhibit 50?

A. Mr.Hughley.

MR. CERESNEY: The government offers Government's Exhibit 50.

MR. SEYMOUR: No objection, your Honor.

THE COURT: 50 is received. The jury may look at it.

(Government's Exhibit 50 received in evidence)

Q. Looking at Government's Exhibit 50, what is the amount of this loan?

A. Principal amount of $5500.

Q. What, if anything, does the form indicate about the purpose of the loan?

A. It says "purpose of this loan is a business loan."

Q. Where does it say that?

A. Right up here at the middle right up above the box.

Q. So you are talking about where it says the "purpose of this loan is a consumer business loan"?

A. Yes, yes.

Q. What, if anything, does the form say about security for this loan?

A. It lists three pieces of security.

Q. What are those?

A. A '85 freight liner, a '91 Ford 350 and an '81 utility trailer.

Q. What kind of truck is the freight liner truck?

A. It is my understanding it was an 18 wheeler.

Q. What kind of truck was the '91 Ford F350?

A. I believe it's a three-quarter ton truck.

Q. What if any paperwork about the property that you used to secure loans do you require from a borrower before that property can be used to secure the loan?

A. You would have to have a state of origin, or a title if it is a used truck, from the borrower so that

you can have it transferred over to his name.

Q. When was this loan due to be paid?

A. 4/30/94.

Q. April 30th?

A. Yes.

Q. How many payments were to be made on this loan?

A. One.

Q. One payment loan?

A. Yes.

Q. What are such loans typically used for?

A. Business purposes.

Q. Why would somebody who is in a business want such a loan?

A. Normally during the course of this loan they will have a source of income that will be applied to the loan, maybe at the time of the loan that they wouldn't have it but sometimes between then and the maturity date they would have funds to apply against the loan through the sale of something, would be the main reason.

Q. Who was responsible for paying this loan?

A. Bobby Hughley.

Q. If the loan defaulted who would be liable?

A. Mr. Hughley.

Q. Let me show you what has been marked as Government's Exhibit 51 for identification. What's Government's Exhibit 51 for identification?

A. It's a commercial loan from our bank to Mr. Hughley.

Q. What's the date on that loan?

A. 5/3 -- May 3rd, 1994.

Chance - direct

Q. Who signed this loan?

A. Bobby Hughley.

MR. CERESNEY: The government offers Government's Exhibit 51.

MR. SEYMOUR: No objection, your Honor.

THE COURT: All right, 51 is received.

(Government's Exhibit 51 received in evidence)

Q. Looking at Government's Exhibit 51, what is the relationship between Government's Exhibit 51 and Government's Exhibit 50?

A. Exhibit 51 is a renew of Government's Exhibit 50, plus an additional advance of $2500.

Q. So it is the $5500 from Government's Exhibit 50 plus $2500 more?

A. Yes. $5500 renewal, $2500 new money.

Q. When was that loan dated?

A. 8/31/94.

Q. August 31st?

A. Yes.

Q. How many payments were to be made on this loan?

A. One.

Q. What, if anything, does the form indicate was the purpose of this loan?

A. Business loan.

Q. Where does it indicate that?

A. Here, same spot as the other loan.

Q. Where it says the purpose of the loan?

A. Yes.

Q. Where it says "consumer business loan"?

A. Yes.

Q. What if any property was used to secure this

loan?

A. Two pieces of property, a '91 Ford F350 truck and a '81 utility trailer.

Q. Let me show you what's been marked as Government's Exhibit 52 for identification. What is Government's Exhibit 52?

A. It's a loan from People's State Bank to Bobby Hughley, renewal, loan renewal.

Q. What's the date on that renewal?

A. November 30, 1994.

Q. Is that loan signed?

A. Yes, it is.

Q. By whom?

A. Bobby Hughley.

MR. CERESNEY: The government offers Government's Exhibit 52 into evidence.

MR. SEYMOUR: No objection.

THE COURT: 52 is received.

(Government's Exhibit 52 received in evidence)

Q. Looking at Government's Exhibit 52, how does this loan relate to Government's Exhibits 50 and 51?

A. This loan here is a renewal of Exhibit No. 51.

Q. What was the amount outstanding on those previous loans?

A. $8,000.

Q. What if any property was used to secure this loan?

A. An '86 Ford F600 truck and a '91 Ford F350.

Q. The '91 Ford F350, is that the same truck that secured Government's Exhibits 50 and 51?

A. Yes.

Q. Does the loan indicate the purposes for which -- excuse me.

What, if anything, does the loan indicate this security would be used for, the trucks would be used for?

A. In the same spot as on the previous loans, the property would be used for business purposes.

Q. Are you talking about right in the middle of the page, right above the box?

A. Right above the box, yes.

Q. And that indicates that the trucks are going to be used for business purposes?

A. Yes.

Q. Where would you have gotten that information?

A. From the customer.

Q. Is that Mr. Hughley?

A. Yes.

Q. Let me show you what's been marked as Government's Exhibit 53 for identification. Before I go on to that one, let me ask you as to Government's Exhibit 52 and the 1986 F600 truck. What kind of paperwork would you have to have seen before you would approve that truck as security for your loan?

A. The same thing as in all other automobiles and trucks in the state of Georgia, you have to have either a statement of origin or a certificate of title.

Q. Did Mr. Hughley show you a certificate of title in this case?

A. To the best -- yes.

Q. Looking at Government's Exhibit 53 which is

marked for identification, what is that?

A. That's a note from People's State Bank to Mr. Hughley.

Q. What's the date of that note?

A. 2/26/96. February 26.

Q. Who signed that note?

A. Bobby Hughley.

MR. CERESNEY: The government offers Government's Exhibit 53.

MR. SEYMOUR: No objection, your Honor.

THE COURT: Received.

(Government's Exhibit 53 received in evidence)

Q. How does this note relate to the previous loans?

A. It's a renewal.

Q. Of the previous loans?

A. Yes.

Q. What was the amount outstanding at this point?

A. $7,385.53.

Q. What if any property secured this loan?

A. '88 Mack truck.

Q. Does it indicate '88 Mack MS250P, and then says C & CHS? What does that mean?

A. Cabin and chassis.

Q. What does that mean?

A. It is a larger truck than the '91 Ford F350 that we have been talking about. It is kind of a dual axle truck I believe.

Q. How does it relate in size to the '86 Ford F600?

A. Larger.

Chance - direct

Q. Would Mr. Hughley had to have shown you any paperwork on the '88 Mack truck?

A. Yes.

Q. The same paperwork as for previous trucks?

A. Yes.

Q. What, if anything, does the note indicate that the '88 Mack truck was being used for?

A. Business purposes.

Q. Is that in the same place where you indicated on the previous note?

A. Yes, right above the box.

Q. Did Mr. Hughley renew this loan?

A. Yes.

Q. Let mow show you what has been marked as Government's Exhibit 54 for identification. What is Government's Exhibit 54?

A. It's also a loan from our bank to Mr. Hughley.

Q. What's the date of this loan?

A. June 25, '97.

Q. Who signed this loan?

A. Mr. Hughley.

MR. CERESNEY: The government offers Government's Exhibit 54.

MR. SEYMOUR: Objection on time frame grounds, your Honor.

THE COURT: Which grounds?

MR. SEYMOUR: Time frame, June of 1997.

THE COURT: No, I think because of certain entries on it and its relation to the others the objection is overruled. You have an exception, Mr. Seymour. You have preserved it. Go ahead.

(Government's Exhibit 54 received in evidence)

Chance - direct

Q. How does this relate to the previous loans?

A. It's a renewal.

Q. What was the outstanding balance on the loan at that time?

A. $7,802.41.

Q. What if any property was this loan secured by?

A. '88 Mack, model MS250 truck.

Q. Is that the same truck as Government's Exhibit 53?

A. Yes.

Q. What happened to this loan?

A. This loan was not paid by Mr. Hughley and as on the front it was a charged off loan.

Q. What does a charged off loan mean?

A. That means that the loan was charged off against the bank's profit of that year because of nonpayment.

Q. You testified earlier that you gave Mr. Hughley truck purchase loans, right?

A. Yes.

Q. You said you issued a truck purchase loan in 1992

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Q. When was this loan actually due?

A. 1/8/95.

Q. How many payments were to be made to this loan?

A. One.

Q. Did Mr. Hughley renew this loan?

A. I don't recall.

Q. What if any paperwork would have been

created with the renewal?

A. Any renewals would require a new loan.

Q. Let me show you what's been marked as Government's Exhibit 56 for identification. What is Government's Exhibit 56?

A. It's a loan from People's State Bank to Bobby Hughley.

Q. What's the date of that loan?

A. 3/31/95.

Q. Did anyone sign that loan?

A. Bobby Hughley.

MR. CERESNEY: The government offers Government's Exhibit 56.

MR. SEYMOUR: No objection.

THE COURT: 56 is received.

(Government's Exhibit 56 received in evidence)

Q. How does this loan relate to Government's Exhibit 55, the truck purchase loan?

A. This loan right here is a renewal of that, plus one other loan.

Q. So it is a renewal of two loans?

A. Yes.

Q. One of those loans is Government's Exhibit 55?

A. Yes.

Q. What if any property was used to secure this loan?

A. Two pieces of property, '86 Ford cabin chassis and a '91 Ford F350.

Q. Those were some of the same trucks we talked about before?

A. Yes.

Chance - direct

Q. Let me show you Government's Exhibit 57 that's been marked for identification. Do you recognize Government's Exhibit 57?

A. Yes.

Q. What is it?

A. It is a loan from People's State Bank to Bobby Hughley.

Q. What's the date on that loan?

A. 3/31/96.

Q. Who signed that loan?

A. Bobby Hughley.

MR. CERESNEY: The government offers Government's

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credible person or you wouldn't have recommended that your bank loan him money, right?

A. True.

Q. And there was nothing about the conversations you had with him that suggested that he was trying to conceal his business from anybody, was there?

A. No.

Q. He wasn't secretive about it?

A. No.

Q. Did he ever tell you the name of the business?

A. Not that I recall, no.

Q. Did you ever actually see him doing any business yourself?

A. No.

Q. And is it right that the reason you first issued a loan or recommended a loan to him was because of the relationship with Mr. Houston?

A. Yes.

Q. Mr. Houston is a long-time customer of your bank?

A. Yes.

Q. And in fact, that very first loan that Mr. Ceresney showed you the paperwork for included as security what you describe as an 18-wheeler truck, right?

A. Yes.

Q. That's Mr. Houston's truck, isn't it?

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Q. What were you doing when you saw him?

A. I was just on regular patrol.

Q. What was he doing when you saw him?

A. I'm sorry. What he was doing. He was selling or working on a truck with vegetables and fruits.

Q. You said that you started in February of 1997. When would this have been?

A. Around the same time, February or March.

Q. What kind of produce was he selling?

A. Fruits, vegetables.

Q. Did you see any customers?

A. Yes.

Q. How often would you see him during that period?

A. Maybe weekly or every other week.

Q. Did you ever have occasion after that to meet Mr. Hughley?

A. Yes.

Q. How did you meet him?

A. He came to my office.

Q. Why did he come to your office?

A. He said that he wanted to --

MR. SEYMOUR: Your Honor, could we have a time frame of this conversation.

THE COURT: Yes.

Q. Can you give us a time period when he first came to your office?

A. Shortly after my assignment. Maybe February or March.

Q. So how long after the time you first saw him did he actually come to your office?

A. To the best of my recollection, within two months.

Q. So that would put it in like May?

A. I think maybe before that.

Q. April or May?

A. Yes.

Q. What did Mr. Hughley ask you?

A. He wanted to know about licensing and permits.

Q. For what purpose?

A. To expand his business, to go into a trailer, to sell from his trailer.

Q. Why did he come to you?

A. Because I'm the district manager of that area.

Q. Why would he come to the district manager if he wanted to expand his business?

A. That position is pretty much like the liaison between the city and the community.

Q. Who owned the lot that he wanted to move into?

A. The city.

Q. What did he want to do in that lot?

MR. SEYMOUR: Your Honor, I object to this as irrelevant, outside the time frame. Prospective.

THE COURT: You clearly have established it is April or May. If there is testimony about something before March 12th, fine. But I don't see why April or May is admissible.

MR. CERESNEY: Your Honor, I am just establishing the context for the meeting later on with Linda Davis that the resulted from this particular context. That's all we are going to ask.

That's it.

THE COURT: He's not charged with doing anything after March 12th and the jury understands that. He could have been doing anything in the way of work after March 12th, and you can't consider that as guilt for anything relating to March 12th or before March 12th.

Now, if you are making the representation to me, Mr. Ceresney, that proof of a conversation after March 12, 1997 with Mr. Badger is in some way going to be probative of the events of March 12th and what precedes March 12th, I'm permitting it. But only based on that representation by you.

MR. CERESNEY: Your Honor, I will I think establish that in just a moment.

THE COURT: All right. The objection is overruled.

Q. When Mr. Hughley came into your office did he discuss his business?

A. Yes.

Q. What did he tell you about how he ran his business?

A. That he sold vegetables that he got from down south.

Q. Did he tell you how often he went down south to get these vegetables?

A. I believe he said weekly.

Q. What did you tell him to do at that point?

A. I told him then to contact the Liveable City's Initiative neighborhood specialist.

Q. Any particular person there?

A. Specifically, Linda Davis.

MR. CERESNEY: Your Honor, a moment, please?

THE COURT: Yes.

(Pause)

Q. Sergeant Badger, let me take you back to the February/March, 1997 time period you talked about in the beginning. You said you saw the defendant selling produce?

A. That's correct.

Q. Where actually did you see him selling produce?

A. In that 300 block of Dixwell Avenue.

Q. What was he selling it out of?

A. A personal vehicle. I don't recall which.

Q. And you said you saw customers there?

A. Yes.

MR. CERESNEY: One more moment, your Honor.

THE COURT: Yes.

MR. CERESNEY: No further questions.

THE COURT: Any cross-examination?

MR. SEYMOUR: Ms. Rosky will cross-examine.

THE COURT: Fine. You may cross, Ms. Rosky.

CROSS- EXAMINATION

BY MS. ROSKY:

Q. Good morning, Sergeant Badger.

A. Good morning.

Q. You said that Mr. Hughley came to your office to discuss this permit issue with you?

A. Yes.

Q. When he came into your office was there anything about the way he spoke to you or held himself that indicated that he was involved in criminal activity?

A. No.

Q. So you didn't have any suspicion that he was involved in any unlawful activity?

A. No.

Q. You said that you saw Mr. Hughley for the first time when you were out on regular patrol before you became a

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A. It has the department's stamp at the top.

Q. What does the stamp indicate the date it was received?

A. July 8, 1994.

Q. Is this application maintained in the ordinary course of the Department of Revenue's business?

A. Yes.

MR. CERESNEY: The government offers Government's Exhibit 80.

MR. SEYMOUR: No objection, your Honor.

THE COURT: 80 is received. The jury may look at 80.

(Defendant's Exhibit 80 received in evidence)

Q. I see on top -- let me show you where it says Reason for Applying, question 1. What did Mr. Hughley check there?

A. "Started a new business."

Q. Let me back up. Who would have filled out this application.

A. The sole proprietor.

Q. Who was that in this case?

A. Bobby Hughley.

Q. I see that it asks for owner's name and all partners' names. Who is indicated there?

A. Bobby L. Hughley.

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Q. Did he report it for certain periods?

A. Yes.

Q. Was that for a quarter or for a year?

A. Quarterly.

Q. Now, let's take September of 1994. What

gross receipts did he report in that quarter according to Government Exhibit 81?

A. $3500.

Q. December 1994, what gross receipts did he report in December of 1994?

A. $4500.

Q. How about in March of 1995, what gross receipts did he report for the period - - would that be the period ending March 1995?

A. Yes.

Q. What gross receipts did he report for that period?

A. $3,000.

Q. And June 1995, period ending June 1995, what did Mr. Hughley report as his gross receipts during that period?

A. $2800.

Q. And again, what are gross receipts?

A. That's the amount of his sales.

Q. It says there, according to Mr. Hughley, there was no tax due. Why was that?

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deputy.

There is a separate document, Judge, which shows the cocaine urinalysis and we should probably mark that as an exhibit as well.

THE COURT: This is not the one that I marked, Court Exhibit 1, this morning.

MR. CERESNEY: I have that, your Honor.

THE COURT: You have this page 2 of this and this is going to become the next defense exhibit.

THE CLERK: Q.

THE COURT: This is Defense Exhibit O for identification, the four page document. I would make the observation, that just looking in the second column on the top of the front page it reads BP, which I take to be blood pressure, because under that is P, which I take to be pulse. The blood pressure is 138 over 84 and the pulse is 80. Over on the right there a check in the high blood pressure column next to which is written PT, which is patient. I must say 138 over 84 isn't high blood pressure.

MR. SEYMOUR: The defendant takes medication for blood pressure.

THE COURT: Did you elicit from the witness what ETOH is?

MR. SEYMOUR: Actually I didn't specifically ask her that but I know from a medical dictionary that that's alcoholism, ethyl toxicity.

She confirmed it to my colleague.

THE COURT: Thank you. Could I see the detox sheet which I am going to write on Defense Exhibit R for identification.

Smith

Bring the witness in without the jury.

MR. SEYMOUR: Yes, your Honor.

THE COURT:

CYNTHIA SMITH,

called as a witness by the defendant,

having been duly sworn, testified as follows:

THE COURT: Before you ask any questions, Mr. Seymour, let me just chat with Ms. Smith here a minute.

Ms. Smith, first of all, thank you very much for being willing to show up and appear at such a short notice.

THE WITNESS: You are welcome.

THE COURT: A lot of citizens would have raised all kinds of obstructive reasons why they couldn't be here.

THE WITNESS: I raised them too.

THE COURT: Well, thank you for being so frank and honest. And we appreciate it.

Let me say this to you, ma'am, have you ever testified before?

THE WITNESS: Not professionally.

THE COURT: Well –

THE WITNESS: Nothing about nursing or nursing care. I testified about what I know about something else.

THE COURT: Don't you be nervous about anything. Just try and listen to what Mr. Seymour asks you and then what I ask you and just try to answer the question directly that you are asked. Try not to volunteer any information. And pull the chair forward to the microphone and let's hear, Mr.

Seymour, what you want to elicit.

BY MR. SEYMOUR:

Q. Very briefly, Ms. Smith –

THE COURT: You may lead up to the key points.

Q. You are a registered nurse and you work at the Veterans Administration Hospital on 23rd Street in Manhattan?

A. Yes.

THE COURT: Maybe sure you say yes or no. Am I correct that you are certified as a substance abuse nurse?

A. Yes, I am.

Q. As well as in mental health admissions or training.

A. Certified in mental health and psychiatric nursing.

Q. Nursing. I'm sorry. And you recall that you were on duty at the hospital on March 12, 1997?

A. Yes, I do.

Q. Is part of your job to do admissions of patients who seek to be admitted to the hospital?

A. Yes, sir.

Q. And that involves an interview and going over a four page form that the hospital uses?

A. Yes.

Q. On March 12, 1997, do you believe that around 6:30 p.m. in conducted an admissions interview with a gentleman by the name of Bobby Hughley?

A. Yes, I do.

Q. Do you have a specific recollection of meeting

Smith

Mr. Hughley and speaking to him that day?

A. Yes, I do.

THE COURT: Do you recognize him? He's the man sittingthere?

THE WITNESS: Yes, I do.

THE COURT: You do recognize him?

THE WITNESS: Yes, I do recognize him.

THE COURT: Go ahead.

Q. Why was it that Mr. Hughley was seeking to be admitted to the Veterans Hospital?

A. For detoxification.

Q. Did you understand that a urinalysis was done of Mr. Hughley prior to the time where he spoke with you?

A. It's routinely done.

Q. Do you have an understanding of how long cocaine stays in the system so that it would be detected in a urinalysis?

A. It stays in the system a couple of days. I'm not quite sure because there is discrepancy about how long one drug takes as opposed it to another and has to do really with excretion, because even though the drug technically is supposed to be in the system for five days, if the person doesn't excrete is it very well it could be there for ten days. If there is it rapid excretion it could be there for five days. But excretion has a bearing on it.

Q. Let me ask you this, in your experience in admitting patients who are seeking detoxification from narcotics, have you ever had one admitted who is not on narcotics at the time he seeks detoxification, he or she seeks detoxification?

Smith

A. Once in while somebody will come and try to feign that. But as a general rule the experienced staff knows a person who is feigning as opposed to the regular user. But along with that most people who seek detoxification usually use a substance the night before or the morning before, minutes before in the admitting room before they get into the unit to make sure evidence is there for the detoxification.

Q. What do you recall about the condition of Mr. Hughley at the time he was admitted or interviewed for admission by you on March 12, 1997?

A. His behavior was typical of a person who is coming for detoxification from cocaine and alcohol.

Q. Would you describe what you observed -- how you can see that behavior? What is it that you observed that leads to that conclusion?

A. A person who is coming for detox from cocaine, especially a person who has been using for a while, the person would hypervigilant, looking around, fidgety, he is quite charming, he is - -

THE COURT: A little slower, ma'am.

A. A person tends to be charming, the person tends to be too talkative. The person tends to be grandiose, and the person complains of hunger quite frequently, and sometimes they are underweight for their age and their body structure.

THE COURT: Could I ask you a couple of questions. When you say that you remember Mr. Hughley, how many times after March 12th at around 6:30 in the evening did you see him thereafter?

THE WITNESS: I saw him on the unit for the

Smith

next couple of days while he was there.

THE COURT: So it was not that you just saw him that once?

THE WITNESS: No.

THE COURT: You saw him several times?

THE WITNESS: Right, and I had reason to remember him.

THE COURT: Why do you have reason to remember him?

THE WITNESS: Because an incident occurred with a supervisor, another nurse and myself and he was in for very peripherally, he was not a patient involved. But whenever we talk about the incident his name comes up.

THE COURT: How long after he was admitted was this incident?

THE WITNESS: Could be within the week because I remember the detox was essentially about seven to ten days.

THE COURT: When somebody comes in, if they are acutely overdosing, doesn't that affect their blood pressure?

THE WITNESS: It all depends on what. If the person is acutely overdosing from alcohol their blood pressure would be sky high. If they are --

THE COURT: So then he was not acutely overdosing from alcohol, was he?

THE WITNESS: No.

THE COURT: The form indicates --

THE WITNESS: I take that back. As a general rule. Because some people have low blood pressure and so the elevation would not be there.

Smith

But as a general rule.

THE COURT: The certification that you have, did you attend school to receive this certification?

THE WITNESS: I did a refresher course because I had been working in substance abuse for close to 20 years and certification with nurses is not that old, and so most of us were working in particular areas and never got certified. But since there has been cutdown and cutback, everybody gets certified and I did.

THE COURT: Are you a registered nurse?

THE WITNESS: Yes, I am.

THE COURT: Where did you receive your RN degree?

THE WITNESS: In Jamaica.

THE COURT: Was that at college?

THE WITNESS: No, it was a hospital program.

THE COURT: Do you have an RN certificate in New York State?

THE WITNESS: Oh, yes. We have a license.

THE COURT: Was there anything that you remember about Mr. Hughley on the evening of March 12th, not thereafter but on the evening of March 12th, that you can tell us or tell me that he did that was aberrational, unusual, or that he any way other than he said that he wanted to receive treatment for cocaine addiction or he wanted to be detoxified from cocaine and he said from alcohol? He wasn't drunk, was he?

THE WITNESS: No. I shouldn't say he wasn't drunk. He did not appear to be drunk, so we did

not Breathalyze him.

THE COURT: He did not appear to be drunk. Did he appear to be doing anything aberrational or unusual?

THE WITNESS: Unusual would be that he came in and he did not appear to be a person who has been using drugs who needs to be detoxified. If he came in high and fidgety and falling asleep, slurred speech and the whole nine yards, then we would consider that normal for admission.

THE COURT: So he was not falling asleep, he was not doing anything that would make you think in the first instance that he was under the influence of cocaine, is that correct?

THE WITNESS: No, no, no, that's not correct.

THE COURT: Then I misunderstood your answer.

THE WITNESS: I'm saying that if he came in and he was, quotes, for want of a better word, normal-looking, doesn't appear to have any of the characteristics of a user, then that would be unusual. But if he came in fidgety and drooling and hyper, that would be quite normal.

THE COURT: Was he drooling?

THE WITNESS: I don't remember that he was drooling. Hyperactivity I remember. The drooling I don't remember. Talkative, loquacious, that I remember.

THE COURT: Go ahead, Mr. Seymour. Anything
else?

MR. SEYMOUR: No, nothing else, your

Honor.

THE COURT: I rule -- does the government wish to ask any questions or is the government ready to permit me to rule? I take it you object to the testimony?

MR. CERESNEY: Yes.

MR. SEYMOUR: Your Honor, before you rule, could I have just a moment?

THE COURT: Yes.

(Pause)

MR. SEYMOUR: Thank you, your Honor. I'm sorry.

THE COURT: I rule the testimony inadmissible. I do not believe that there is sufficient evidence that could be elicited from Ms. Smith to indicate that Mr. Hughley could not have formed an intent to deceive and defraud on March 12th.

I don't think that she could ultimately give opinion, and tried to elicit it as to her ability to form an intent. We don't know, and we don't really have any idea that he was acting that aberrational. I think the testimony is subject to too much speculation and the fact that someone is a drug user, who was not drunk at the time, filled out a form that contained an alleged misstatement, I don't think that excuses it and I don't think it rises to admissible testimony.

You have an exception obviously to my ruling.

MR. SEYMOUR: We do, your Honor.

THE COURT: Thank you very much again, Ms. Smith.

Smith

THE WITNESS: You are welcome.

(Witness excused)

MR. SEYMOUR: Your Honor, when the jury returns, the defense will rest.

THE COURT: I am going --

MR. CERESNEY: Your Honor, one other thing to add as far as your ruling. I also wanted to note that the government also believes this evidence was also inadmissible under 12.2(b), as improperly offered pursuant to failure to give notice under Rule 12.2(b).

THE COURT: Well, there is a continuing obligation under Rule 16. I take it that Mr. Seymour really just found out about this and it seems that the testimony would have been offered as expert testimony. There was no other way it was being offered.

MR. SEYMOUR: Well, your Honor, I think the record is clear that we just learned of the existence and

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feel that the government have not followed what Congress intended and, you know --

THE COURT: All right. Is there anything else?

THE DEFENDANT: Your Honor, when you impose sentence, I have obligation, I have a home to try to secure, I have kids just now getting back to school, I am involved in a financial meltdown. I have nothing. I have not set out to defraud the government. I have been upright with the government ever since I have been receiving worker's compensation. I have reported when I should have reported. And I don't know of anything else that I could have did in my power. What I did was reported and the government have a responsibility to do their part. Even though a trial have been taking place, I have been found guilty, but I have other remedies to take before the board and stuff like that. But I would like the Court to leave open the option the Appeals Board may rule: Come back and let's try to get this thing straightened out.

I just can't go to prison and leave a home and for somebody to run -- it took my family, my kids, my wife, my stepson, it took us a lot of doing to get a decent place to live, and I have not profited with anything that the government -- out of the $68,000. Where have I profited? I ask the Court to be lenient as possible or whatever. I respect the Court. I respect you.

THE COURT: On the issue of minimal

planning, I believe that it would be gross abuse of my discretion not to find that there was more than minimal planning here. The defendant's conduct and his behavior clearly constituted more than minimal planning. There were false statements made to the Department of Labor on at least three occasions, and in my view the law is correctly stated by the Court of Appeals for the Tenth Circuit in *United States against Henry,* 134 F.3d, page 1304, particularly at page 1310. And in my view the law requires that I find that there was more than minimal planning.

In my view, the amount of loss is correctly set at $68,354.76. I understand the government's argument as to why the loss calculation figure should be the 100,000-plus figure. I disagree completely with the defense argument about it being 33,000. I think a good argument can be made that the $68,000 figure is the appropriate figure and I will take the $68,000 figure. Frankly, if the $68,000 figure is good enough for the Department of Labor, as is set forth in paragraph 22, it's good enough for me. I think $123,366 is just too high. I think it takes the offense level so high that it's unfair.

I don't see any grounds to depart here. I don't believe there are any grounds to depart. This is not a case that is in any way out of the "heartland" so I can't depart, and the loss being fixed at $68,354, that makes the offense level with the minimal planning a 13, and at the offense level 13, the guideline scope is 12 to 18 months. I don't

see any way I can go below the 12 to 18 months.

So, it is adjudged that the defendant be committed to the custody of the Attorney General of the United States, or her authorized representative, for a term of one year and one day. At the expiration of the period of incarceration, the defendant is to serve a period of supervised release of 36 months, not 24 months as recommended by the Probation Department, under the mandatory and standard conditions of supervised release. The defendant is to participate in any program directed by the Probation Office for substance abuse and that program should include drug testing and testing for alcohol. I am not ordering that he contribute to the cost of the testing or the program. In other words, I am specifically not ordering copayment in view of another part of the sentence that I haven't gotten to yet.

The record should reflect that besides reading all of this yesterday, I also conferred with the probation officer, Mr. Oppenheim. I pointed out to him that in my view there was a serious mistake in the report, and he acknowledged that there was, it was an oversight on his part, it was unintended. In that portion of the report where it refers to restitution, he has N slash A meaning not applicable. That is dead wrong. Restitution is appropriate in this case. So I am not ordering copayment as to drug testing or alcohol testing because I am going to order restitution in a moment.

I am not fixing any fine because the

defendant cannot pay a fine. I am ordering restitution in the full amount of the $68,354.76. There is no interest to run on restitution payments. The restitution payments to be made at a rate of 15 percent of Mr. Hughley's gross earnings as he receives them over the 36 months of the period of supervised release. Should the defendant receive any windfall financially during the period of supervised release, or during his period of incarceration, that windfall is to be utilized to pay the restitution immediately. If the 15 percent payments over the three-year period do not amount to the amount of $68,354.76, I will not deem that to be a failure to pay restitution as long as he pays the 15 percent. If that ends up not amounting to the full 68,000 plus, so be it.

Two $100 special assessments are affixed as required by the Comprehensive Crime Control Act of 1984 as amended.

The defendant is advised of his right to appeal the conviction in the case, and I direct Mr. Seymour and Ms. Rosky to file a notice of appeal on his behalf. I don't know if you will continue to represent him on the appeal, but I do direct that a notice of appeal be filed on his behalf, and I also advise the defendant of his right to appeal the sentence in the case.

The defendant said a few things in his remarks that I think should be addressed concerning the question of time to surrender.

MS. ROSKY: We would request that the defendant be permitted 60 days to voluntarily

surrender.

THE COURT: Does the government have any position relating to this?

MS. ROSKY: Excuse me, your Honor. Can I have a moment, please?

Mr. Hughley would like to request 120 days in which to voluntarily surrender so that he can properly close his affairs.

THE COURT: Let me hear from the government.

MR. CERESNEY: We will defer to your Honor's judgment on this issue, although I think 120 days is probably a little excessive.

THE COURT: I think 120 is a little long.

I direct that the defendant be given time to surrender, but I direct that he surrender to the United States Marshal Service on Monday, November 29th, 1999, at 10 o'clock, at the United States Marshal's Office in this building.

That's the sentence of the Court.

MR. SEYMOUR: Thank you, your Honor.

THE DEFENDANT: Thank you, your Honor.